No. 15-8366	*** CAPITAL CASE ***
Title:	Shawn Patrick Lynch, Petitioner
	v.
	Arizona
Docketed:	February 29, 2016
Lower Ct:	Supreme Court of Arizona
Case Nos.:	(CR-12-0359)
Decision Date:	September 10, 2015
Rehearing Denied:	November 30, 2015

---Date---	-------Proceedings and Orders----------
Feb 25 2016	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due March 30, 2016)
Mar 29 2016	Brief of respondent Arizona in opposition filed.
Apr 7 2016	Reply of petitioner Shawn Patrick Lynch filed.
Apr 14 2016	DISTRIBUTED for Conference of April 29, 2016.
May 9 2016	DISTRIBUTED for Conference of May 12, 2016.
May 16 2016	DISTRIBUTED for Conference of May 19, 2016.
May 23 2016	DISTRIBUTED for Conference of May 26, 2016.
May 31 2016	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED. Judgment REVERSED and case REMANDED. Opinion per curiam. (Detached Opinion). Justice Thomas, with whom Justice Alito joins, dissenting. (Detached Opinion)
Jul 5 2016	JUDGMENT ISSUED
Jul 5 2016	MANDATE ISSUED

No. 15-8366

IN THE

Supreme Court of the United States

Supreme Court, U.S.
FILED
FEB 25 2016
OFFICE OF THE CLERK

SHAWN PATRICK LYNCH,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE ARIZONA SUPREME COURT

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

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Petitioner, Shawn Patrick Lynch, requests permission to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

Petitioner proceeded through all phases of the Arizona Superior Court and the Arizona Supreme Court as an indigent defendant with counsel appointed by Maricopa County. An affidavit supporting this motion is attached.

Respectfully submitted this 25th day of February, 2016.

MARICOPA COUNTY PUBLIC DEFENDER

By _____

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AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Shawn P. Lynch, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	$ Ø	$	$	$
Self-employment	$ Ø	$	$	$
Income from real property (such as rental income)	$ Ø	$	$	$
Interest and dividends	$ Ø	$	$	$
Gifts	$ Ø	$	$	$
Alimony	$ Ø	$	$	$
Child Support	$ Ø	$	$	$
Retirement (such as social security, pensions, annuities, insurance)	$ Ø	$	$	$
Disability (such as social security, insurance payments)	$ Ø	$	$	$
Unemployment payments	$ Ø	$	$	$
Public-assistance (such as welfare)	$ Ø	$	$	$
Other (specify):	$ Ø	$	$	$
Total monthly income:	$ Ø	$	$ Ø	$ Ø

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A			$ 0
N/A			$ 0
N/A			$ 0

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A			$ 0
N/A			$ 0
N/A			$ 0

4. How much cash do you and your spouse have? $ 0
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial Institution	Type of account	Amount you have	Amount your spouse has
N/A		$ 0	$ 0
N/A		$ 0	$ 0
N/A		$ 0	$ 0

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value 0

☐ Other real estate
Value 0

☐ Motor Vehicle #1
Year, make & model N/A
Value N/A

☐ Motor Vehicle #2
Year, make & model N/A
Value 0

☐ Other assets
Description N/A
Value 0

	You	Your spouse
Transportation (not including motor vehicle payments)	$ Ø	$ Ø
Recreation, entertainment, newspapers, magazines, etc.	$ Ø	$ Ø
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ Ø	$ Ø
Life	$ Ø	$ Ø
Health	$ Ø	$ Ø
Motor Vehicle	$ Ø	$ Ø
Other: _____	$ Ø	$ Ø
Taxes (not deducted from wages or included in mortgage payments)		
(specify): _____	$ Ø	$ Ø
Installment payments		
Motor Vehicle	$ Ø	$ Ø
Credit card(s)	$ Ø	$ Ø
Department store(s)	$ Ø	$ Ø
Other: N/A	$ Ø	$ Ø
Alimony, maintenance, and support paid to others	$ Ø	$ Ø
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ Ø	$ Ø
Other (specify): N/A	$ Ø	$ Ø
Total monthly expenses:	$ 3	$ 2

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
Ø	$ Ø	$ Ø
Ø	$ Ø	$ Ø
Ø	$ Ø	$ Ø

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
N/A		
N/A		
N/A		

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home)	$ Ø	$ N/A
Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No		
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ Ø	$ Ø
Home maintenance (repairs and upkeep)	$ Ø	$ Ø
Food	$ Ø	$ Ø
Clothing	$ Ø	$ Ø
Laundry and dry-cleaning	$ Ø	$ Ø
Medical and dental expenses	$ Ø	$ Ø

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☑ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☑ No

If yes, how much? Ø

If yes, state the attorney's name, address, and telephone number: N/A

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☑ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number: N/A

12. Provide any other information that will help explain why you cannot pay the costs of this case.

INCARCERATION - D.O.C Inmate

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 1-30, 2016

Shawn Finch

(Signature)

No. 15-8366

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In *Batson v. Kentucky*, 476 U.S. 79 (1986), this Court set forth a three-step process for evaluating whether peremptory strikes were used in a discriminatory manner: (1) the defendant must make a prima facie showing of discrimination, (2) the State must provide a race-neutral reason for the strike, and (3) the court must determine if the defendant demonstrated purposeful discrimination.

   Courts have split regarding how to address a trial court's failure to conduct the third step—an error that occurred here. Three approaches exist: (1) independently review the record and vacate the conviction when the record does not support the proposed race-neutral reasons, (2) remand to the trial court to conduct the third step, and (3) consider a ruling implicit and defer to that implicit ruling.

   What is the proper appellate procedure to address a trial court's failure to conduct the third *Batson* step?

2. Under *Simmons v. South Carolina*, 512 U.S. 154 (1994), when the only legal alternative sentence to death is life without the possibility of parole, upon request, the trial court must inform the jury that life without parole is the only alternative. Possible legislative changes or commutation do not obviate this requirement. While Arizona abolished parole in 1994, and life without parole is the only legally available alternative to death, the Arizona Supreme Court has continuously refused *Simmons* instructions by relying upon the availability of commutation. Has the Arizona Supreme Court decided this question in a manner that conflicts with *Simmons* and its progeny?

3. The Arizona Supreme Court had previously found that the prosecutor in this case, Juan Martinez, committed misconduct in at least two prior cases. In this case, Martinez committed misconduct on approximately seventeen occasions during trial, including two types of misconduct that the Arizona Supreme Court had previously addressed. Is a defendant's Due Process right to a fair trial secure when a prosecutor with a history of misconduct commits misconduct on several occasions through the defendant's trial?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES viii

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT OF THE CASE 2

Batson v. Kentucky claim 2

Simmons v. South Carolina claim 3

Prosecutorial Misconduct claim 4

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW 8

REASONS FOR GRANTING THE WRIT 8

I. During *Batson*'s third step, trial courts determine if the defendant demonstrated purposeful discrimination. Courts are split regarding how to resolve a trial court's failure to conduct the third step. This Court should clarify that independent review is proper because independent review best protects a defendant's and the public's Equal Protection rights under the Fourteenth Amendment. Applying this test, this Court should vacate Lynch's death verdict. 8

A. Because this Court has not yet indicated how lower courts should resolve the failure to conduct the third step of a *Batson* analysis, jurisdictions have created three different approaches: (1) independent review, (2) remand, and (3) deference to an implicit ruling. 10

B. To resolve this split, this Court should clarify that where a trial court has failed to follow *Batson v. Kentucky*, appellate courts must independently review the record and order a new trial when the record does not support a prosecutor's proffered race-neutral reasons. 12

1. Independent review of a prosecutor's proffered reasons and reversal where the reasons are not supported by the record, best comports with a defendant's due process right and the public's equal protection right.....13

2. While remand inadequately protects a defendant's due process right and the public's equal protection right, remand provides more protections than reliance upon an "implicit" ruling.....15

3. The implicit ruling approach is inconsistent with *Batson* and does not protect litigants.....16

C. Applying the correct test—independent review—this Court should vacate Lynch's sentence.....19

Conclusion.....21

II. Because Shawn Lynch was ineligible for parole and the prosecution placed Lynch's future dangerousness at issue, Lynch was entitled to an instruction on parole ineligibility under *Simmons v. South Carolina* and the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. To justify the trial court's refusal to rea a *Simmons* instruction, the Arizona Supreme Court relied upon the availability of clemency—a form of release irrelevant to *Simmons*.....21

A. Lynch was entitled to a *Simmons* instruction; Lynch was not eligible for parole and future dangerousness was at issue.....22

B. The availability of executive clemency does not alter the requirements of *Simmons*.....22

C. Beyond an instruction, the trial court's ruling interfered with Lynch's right to present a complete defense.....23

D. The Eighth Amendment supports a *Simmons* instruction.....24

E. Arizona has a long history of ignoring and refusing to apply *Simmons v. South Carolina*.....25

Conclusion.....26

III. Shawn Lynch's Due Process right to a fair and reliable capital penalty phase, guaranteed by the Fifth and Fourteenth Amendments, was violated by the prosecutor's repeated and persistent misconduct.....27

A. Lynch was denied his right to a reliable death decision by the constant and repeated misconduct in this case.....27

B. Lynch was deprived a fair and reliable trial when he was prosecuted by an attorney who has repeatedly obtained convictions through misconduct. 29

Conclusion 30

APPENDIX

Appendix A *State v. Lynch*, 357 P.3d 119 (Ariz. 2015).

Appendix B Opening Brief.

Appendix C Answering Brief.

Appendix D Reply Brief.

Appendix E Motion for Reconsideration.

Appendix F Arizona Supreme Court Order Denying Motion for Reconsideration.

Appendix G Minute Entry for July 10, 2012, indicating presence of prospective jurors 32 and 34. Instrument 709.

Appendix H Pertinent portions of Reporter's Transcript 7/10/2012.

Appendix I Pertinent portions of Reporter's Transcript 7/16/2012.

Appendix J Pertinent portions of Reporter's Transcript 7/17/2012.

Appendix K State's Motion to Preclude Testimony Concerning Availability of Parole. Instrument 226.

Appendix L Minute Entry for October 18, 20015, granting State's Motion to Preclude Testimony Concerning Availability of Parole. Instrument 274.

Appendix M Opening Brief for Lynch's first appeal, reported at *State v. Lynch*, 234 P.3d 595 (Ariz. 2010). Opening Brief is also available at 2008 WL 6587570.

Appendix N Defendant's Waiver of Right to be Considered for Release-Eligible Sentence and Motion for Jury Instruction Regarding Release Ineligibility (*Simmons* Instruction). Instrument 650.

Appendix O Objection to Defendant's Waiver of Right to be Considered for Release-Eligible Sentence and Motion for Jury Instruction Regarding Release Ineligibility (*Simmons* Instruction). Instrument 663.

Appendix P Pertinent portions of Reporter's Transcript 4/6/2012.

Appendix Q — Minute Entry for April 20, 2012, denying Defendant's Waiver of Right to be Considered for Release-Eligible Sentence and Motion for Jury Instruction Regarding Release Ineligibility (*Simmons* Instruction). Instrument 684.

Appendix R — Preliminary Instructions. Instrument 714.

Appendix S — Final Instructions. Instrument 779.

TABLE OF AUTHORITIES **Page**

UNITED STATES SUPREME COURT CASES

Batson v. Kentucky, 476 U.S. 79 (1986).....2, 3, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21
Berger v. U.S., 295 U.S. 78 (1935).....27, 29
Cone v. Bell, 556 U.S. 449 (2009).....29
Connick v. Thompson, 563 U.S. 51 (2011).....29
Crane v. Kentucky, 476 U.S. 683 (1986).....23
Donnelly v. DeChristoforo, 416 U.S. 637 (1974).....28
Eddings v. Oklahoma, 455 U.S. 104 (1982).....25
Estes v. State of Texas, 381 U.S. 532 (1965).....27-28
Greer v. Miller, 483 U.S. 756 (1987).....28
Hernandez v. New York, 500 U.S. 352 (1991).....9
Holland v. Illinois, 493 U.S. 747 (1990).....9
Irvin v. Dowd, 366 U.S. 717 (1961).....27
Kelly v. South Carolina, 534 U.S. 246 (2002).....21
Miller-El v. Cockrell, 537 U.S. 322 (2003).....9
Miller-El v. Dretke, 545 U.S. 231 (2005).....16, 18, 19, 20
Nichols v. U.S., 511 U.S. 738 (1994).....27
Purkett v. Elem, 514 U.S. 765 (1995).....9, 16, 20
Ramdass v. Angelone, 530 U.S. 156 (2000).....23
Ring v. Arizona, 536 U.S. 584 (2002).....3
Rivera v. Illinois, 556 U.S. 148 (2009).....13
Simmons v. South Carolina, 512 U.S. 154 (1994).....3, 4, 5, 21, 22, 23, 24, 25, 26
Skipper v. South Carolina, 476 U.S. 1 (1986).....23
Snyder v. Louisiana, 552 U.S. 472 (2008).....9, 13
Solem v. Helm, 463 U.S. 277 (1983).....23
Strickland v. Washington, 466 U.S. 668 (1984).....27
U.S. v. Young, 470 U.S. 1 (1985).....28
Woodson v. North Carolina, 428 U.S. 280 (1976).....25, 28

ARIZONA SUPREME COURT CASES

State v. Canez, 42 P.3d 564 (Ariz. 2002).....20
State v. Chappel, 236 P.3d 1176 (Ariz. 2010).....26
State v. Cota, 272 P.3d 1027 (Ariz. 2012).....25
State v. Gallardo, 242 P.3d 159 (Ariz. 2010).....7, 29, 30
State v. Hardy, 283 P.3d 12 (Ariz. 2012).....26
State v. Hargrave, 234 P.3d 569 (Ariz. 2010).....25
State v. Lynch, 234 P.3d 595 (Ariz. 2010).....4
State v. Lynch, 357 P.3d 119 (Ariz. 2015).....1, 3, 4, 6, 10, 12, 20, 22, 28
State v. Morris, 160 P.3d 203 (Ariz. 2007).....7, 29

FEDERAL CASES

Adkins v. Warden, Holman CF, 710 F.3d 1241 (11th Cir. 2013) 11
Coombs v. Diguglielmo, 616 F.3d 255 (3d Cir. 2010) 11
Davis v. Baltimore Gas and Elec. Co., 160 F.3d 1023 (4th Cir. 1998) 18
Dolphy v. Mantello, 552 F.3d 236 (2d Cir. 2009) 11
Gonzalez v. Brown, 585 F.3d 1202 (9th Cir. 2009) 18
Green v. LaMarque, 532 F.3d 1028 (9th Cir. 2008) 11, 18
Jamerson v. Runnels, 713 F.3d 1218 (9th Cir. 2013) 11
Jordan v. Lefevre, 206 F.3d 196 (2d Cir. 2000) 17
Lewis v. Lewis, 321 F.3d 824 (9th Cir. 2003) 18
McCurdy v. Montgomery County, Ohio, 240 F.3d 512 (6th Cir. 2001) 18
McGahee v. Alabama Dept. of Corrections, 560 F.3d 1252 (11th Cir. 2009) 11, 18
Parker v. Allen, 565 F.3d 1258 (11th Cir. 2009) 19
Smith v. Cain, 708 F.3d 628 (5th Cir. 2013) 19
Smulls v. Roper, 535 F.3d 853 (8th Cir. 2008) 11-12
U.S. v. Arce, 997 F.2d 1123 (5th Cir. 1993) 18
U.S. v. Biaggi, 909 F.2d 662 (2d Cir. 1990) 14
U.S. v. Farrior, 535 F.3d 210 (4th Cir. 2008) 17
U.S. v. McAllister, 693 F.3d 572 (6th Cir. 2012) 11, 15, 18
U.S. v. McMath, 559 F.3d 657 (7th Cir. 2009) 11, 15
U.S. v. Rudas, 905 F.2d 38 (2d Cir. 1990) 18
U.S. v. Rutledge, 648 F.3d 555 (7th Cir. 2011) 15, 18

OTHER STATE CASES

Edmonds v. State, 812 A.2d 1034 (Md.App. 2002) 11
Gray v. State, 562 A.2d 1278 (Md.App. 1989) 14
Jones v. State, 938 A.2d 626 (Del. 2007) 11
People v. Davis, 899 N.E.2d 238 (Ill. 2008) 11
State v. Scott, 829 N.W.2d 458 (S.D. 2013) 10, 11

CONSTITUTIONAL PROVISIONS

United States Constitution

Fifth Amendment 1, 8, 21, 27, 30
Eight Amendment 1, 8, 21, 23, 24, 25
Fourteenth Amendment 2, 8, 9, 21, 27, 30

STATUTES

United States Code

28 U.S.C. § 1257(a) 1

Arizona Revised Statutes

§ 13-703(A) 22
§ 41-1604.09(I) 3

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William Burgess & Douglas Smith, *The Proper Remedy for a Lack of* Batson *Findings: The Fall-Out from* Snyder v. Louisiana, 101 J. Crim. L. & Criminology 1 (2011) 10, 11, 13, 14

PETITION FOR WRIT OF CERTIORARI

Petitioner Shawn Lynch respectfully petitions this Court for a writ of certiorari to review the judgment of the Arizona Supreme Court affirming his death sentence.

OPINIONS BELOW

The opinion of the Arizona Supreme Court is reported at 357 P.3d 119 (Ariz. 2015) (Appx. A).

JURISDICTION

The Arizona Supreme Court issued its opinion on September 10, 2015. A timely motion for reconsideration, Appx. E, was denied on November 30, 2015, Appx. F. Petitioner timely filed this petition within ninety days after the order denying reconsideration. This Court has jurisdiction per 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall ... be deprived of life, liberty, or property, without due process of law ....

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No state shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

***Batson v. Kentucky* claim**

Immediately after both parties exercised peremptory strikes, the defense challenged five of the prosecutor's strikes in accordance with *Batson v. Kentucky*, 476 U.S. 79 (1986). Appx. J, 10. Half of the State's ten peremptory strikes were used to dismiss individuals who self-identified as Hispanic: panel members 8, 32, 34, 49 and 255. *Id.* at 10, 12. The State offered legitimate reasons to strike three of the prospective jurors. *Id.* at 10-11 (Juror 255), 11-12 (Juror 49), 14-15 (Juror 8).

But the prosecutor struck jurors 32 and 34 because of their appearance. The State pointed out that Juror 34 had visible tattoos. *Id.* at 12-13. The prosecutor linked this to possible mitigation: there was an indication Lynch may have gotten Hepatitis C from a tattoo. *Id.*

The prosecutor argued he struck juror 32 because juror 32 had a beard, long hair, and generally did not meet the prosecutor's hygiene standards. *Id.* at 13-14.

Although the prosecutor justified his strikes on appearance and the common trait of tattoos, the prosecutor never questioned any jurors tattoos, hair styles, or hygiene. Jurors 32 and 34 were both present for the afternoon panel on July 10, 2012. Appx. G; Appx. H, 117. The prosecutor asked the panel several questions, Appx. H, 130, and directly questioned jurors 32 and 34, *id.* at 151-53. But the prosecutor never questioned any jurors about the issues he later relied upon as bases for his peremptory strikes. *See id.*

The prosecutor did not move to strike either of the jurors for cause. *Id.* at 231. And the prosecutor did not raise any issues when asked if he passed the panel for cause; seeing a juror with exposed tattoos did not prompt the prosecutor to request an opportunity to question the remaining panel about tattoos. Appx. J, 6

When considering the prosecutor's proffered reasons, however, the trial court did not consider any of this background or ask Lynch for a response. *See id.* at 15. Immediately after the State offered its reasons, and without permitting the defense to comment on them, the trial court found the State's reasons were race neutral and permitted the strikes. *Id.* After this ruling, the Defense interjected and stated the reasons provided for jurors 32 and 34 were not satisfactory. *Id.* Without further discussion, the trial court moved on. *Id.*

On appeal, Lynch argued the trial court erred because it failed to conduct *Batson*'s third step. Appx. B, 108-20. The Arizona Supreme Court rejected this argument. *Lynch*, 357 P.3d 119, ¶¶ 67-70. The Court reasoned that the trial court had satisfied the third prong by "implicitly ruling that Lynch did not carry his burden of proving purposeful racial discrimination." *Id.* at ¶ 70.

***Simmons v. South Carolina* claim**

Arizona abolished parole on January 1, 1994. *Lynch*, 357 P.3d 119, ¶ 64; Ariz.Rev.Stat. § 41-1604.09(I). Since then, no adult convicted of a felony has been eligible for parole. The same year, this Court decided *Simmons v. South Carolina*, 512 U.S. 154 (1994). In *Simmons*, this Court held, "where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible." *Id.* at 156 (1994).

At the time, however, Arizona still employed judicial sentencing in capital cases. It was not until this Court decided *Ring v. Arizona*, 536 U.S. 584 (2002), that jury sentencing was used in Arizona.

On September 22, 2005, before Lynch's first trial, the State filed a Motion to Preclude Testimony Concerning Availability of Parole. Appx. K. While the State conceded there was no possibility of parole, the State argued parole ineligibility should not be communicated to the jury

because other unarticulated forms of release were still available. *Id.* The trial court granted this motion. Appx. L.

In his first trial, Shawn Lynch was convicted and sentenced to death. Appealing the first trial, Lynch argued the trial court erred by precluding evidence regarding parole ineligibility. *See* Appx. M, 75-78. The Arizona Supreme Court vacated his death sentence and ordered a new sentencing phase because the trial court improperly explained the aggravating factors. *State v. Lynch*, 234 P.3d 595, ¶¶ 84-89 (Ariz. 2010). However, the Court never addressed Lynch's *Simmons* argument. *See id.* at ¶¶ 82-89 (discussing penalty phase claims).

Because the Court never addressed his *Simmons* argument and the 2005 ruling was still law of the case, Lynch filed Defendant's Waiver of Right to be Considered for Release-Eligible Sentence and Motion for Jury Instruction Regarding Release Ineligibility (*Simmons* Instruction) on March 2, 2012. Appx. N. In addition to waiving any theoretical parole, Lynch requested an instruction modeled after *Simmons*. *Id.* at 9. The State objected. Appx. O.

When the trial court addressed the issue, neither party presented additional argument. Appx. P, 6. The trial court denied the requested instruction. Appx. Q. Consequently, the trial instructions never included a *Simmons* instruction. Appx. S. To the contrary, the opening instructions incorrectly suggested parole was available. Appx. R ("Life without the possibility of release ... means ... [Lynch] will not be eligible for parole ...."). Lynch was again sentenced to death.

On appeal, the Arizona Supreme Court agreed Lynch was not eligible for parole because parole had been abolished and that the prosecutor put Lynch's future dangerousness at issue. *Lynch*, 357 P.3d 119, ¶ 64. Despite meeting both conditions established by *Simmons*, the Court held a *Simmons* instruction was unnecessary. *Id.* at ¶ 65. The Court relied upon the availability of commutation—a form of release this Court expressly rejected in *Simmons*. *Id.*

Prosecutorial Misconduct claim

The prosecutor, Juan Martinez, committed misconduct on several occasions through every stage of Lynch's trial. The following chart summarizes the misconduct found by the Arizona Supreme Court:

Category of Misconduct	Instances	Phase	Opinion citation
Argument During Opening	Two instances: 1. Lynch's childhood should not be considered a mitigating circumstance. 2. Defense wanted to "pull at [the jury's] heart strings."	Opening	¶ 8
Improper witness examination	Eight instances of misconduct: 1. Two instances of asked and answered. 2. Two instances of interrupting witnesses. 3. Comment to expert to "just answer my question for once." 4. Additional argumentative questions. (The opening brief listed three additional questions to which the trial court sustained objections on argument grounds.)	Examination	¶ 11
Questions regarding the veracity of other witnesses	One instance: 1. Martinez's remark that Dr. Brams "can vouch for people" improper.	Examination	¶ 15
Attacks on defense experts	No additional instances: 1. "The trial court sustained Lynch's objections to many of the questions, and the court's instructions to disregard the statements cured any possible prejudice." 2. Instances repeated from improper witness examination category.	Examination	¶ 22 ¶ 19

Category of Misconduct	Instances	Phase	Opinion citation
Misstating the evidence	Three instances of misconduct: 1. Refusal to admit recording because of misstatement. 2. Mischaracterizing Dr. Brams's testimony in different case. 3. Mischaracterizing impact of renting pornographic movies.	Presentation of Evidence Examination Closing	¶¶ 25-26
Vouching	One instance: 1. "[P]rosecutor put the prestige of the government behind his evidence by saying that 'the State does not agree.'"	Closing	¶ 32
Misstating law	At least one additional instance: 1. "The prosecutor struggled … during voir dire and closing argument with the disjunctive 'or' and conjunctive 'and' in explaining the (F)(6) aggravator …." 2. "Prosecutor misstated the law by arguing that Lynch's renting pornographic videos 'shows a debasement in the part of [Lynch's] character." Also addressed in misstating evidence section.	Closing Voir Dire Closing	¶ 43 ¶ 37
Improper Personalization	One instance: 1. "The prosecutor's first comment [about imagining a person approach with a knife] was improper."	Opening	¶ 49

Lynch, 357 P.3d 119, ¶¶ 8,11, 15, 19, 22, 25-26, 32, 37, 43, 49.

In total, the Arizona Supreme Court found at least seventeen instances—and eight different categories—of misconduct. The misconduct spanned over every stage of the penalty phase retrial: voir dire, opening statements, presentation of evidence, witness examinations, and closing arguments.

Martinez's misconduct was foreshadowed by prior claims—and findings—of misconduct, including the same types of misconduct committed here. *See State v. Gallardo*, 242 P.3d 159, ¶¶ 33-47 (Ariz. 2010); *State v. Morris*, 160 P.3d 203, ¶¶ 46-67 (Ariz. 2007).

In *Morris*, Martinez encouraged the jury to place themselves in the victim's position. 160 P.3d 203, ¶ 57. The Arizona Supreme Court found Martinez's comments were misconduct. *Id.* at ¶ 58. However, because the defense failed to object, the Court reviewed for fundamental error and concluded the misconduct was not fundamental. *Id.* at ¶¶ 59- 60.

Similarly, in *Gallardo*, Martinez asked the jury to compare the victim to the defendant. 242 P.3d 159, ¶¶ 41-42. The Arizona Supreme Court presumed the conduct was improper but ruled that a standard jury instruction that the jury should not be swayed by sympathy "negated the effect of the prosecutor's statements." *Id.* at ¶ 42.

Although the Arizona Supreme Court twice considered Martinez's previous improper personalization, Martinez engaged in the exact same behavior here: Martinez again encouraged the jury to place themselves in the victim's position. The Arizona Supreme Court again found this conduct improper. And the Arizona Supreme Court again did nothing to remedy this misconduct.

In *Gallardo*, the Arizona Supreme Court also agreed Martinez committed misconduct by misstating the evidence. 242 P.3d 159, ¶ 44. The Court again relied upon standard instructions to excuse Martinez's misconduct. *Id.*

Despite *Gallardo*'s holding, Martinez again misstated evidence and law in this case. The Arizona Supreme Court again found this conduct improper. And the Court again did nothing to correct the misconduct.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The federal issues Lynch raises in this petition concern fundamental constitutional rights under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. These issues were presented to the Arizona Supreme Court in Lynch's appellate briefs and motion for reconsideration challenging his death sentence. Appx. B, D, E. The issues were considered by the Arizona Supreme Court in its opinion affirming Lynch's death sentence.

REASONS FOR GRANTING THE WRIT

I. During *Batson*'s third step, trial courts determine if the defendant demonstrated purposeful discrimination. Courts are split regarding how to resolve a trial court's failure to conduct the third step. This Court should clarify that independent review is proper because independent review best protects a defendant's and the public's Equal Protection rights under the Fourteenth Amendment. Applying this test, this Court should vacate Lynch's death verdict.

Justice Marshall heralded *Batson v. Kentucky*, 476 U.S. 79 (1986), as "a historic step toward eliminating the shameful practice of racial discrimination in the selection of juries." *Batson*, 476 U.S. at 102 (J. Marshall, concurring). But Justice Marshall warned that *Batson* would "not end the racial discrimination that peremptories inject into the jury-selection process," which could only be accomplished "by eliminating peremptory challenges entirely." *Id.* at 102-03. One of the reasons for Justice Marshall's pessimism highlights the error in this case: "Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons." *Id.* at 106.

Here, not only was the trial court "ill equipped to second-guess" the prosecutor's asserted reasons for striking minority panelists, the trial court refused to even engage in the evaluation. Instead, the trial court denied Lynch's *Batson* claim merely upon the prosecutor's ability to conjure race-neutral reasons for the strikes—reasons that focused upon the appearance of two jurors. *See*

Appx. J, 12-15. The trial court did not even engage in the third step of the *Batson* analysis: the trial court did not assess the credibility of the reasons, the trial court did not consider whether the record supported the reasons, and the trial court did not even allow Lynch to respond.

Discussion:

In *Batson*, this Court held that discriminatory use of peremptory strikes violates the Fourteenth Amendment's Equal Protection Clause. 476 U.S. at 85-86. The right to a jury that represents a fair cross section of society extends to all defendants, regardless of whether the defendant is a member of a minority group. *Holland v. Illinois*, 493 U.S. 747, 476-77 (1990). To evaluate whether a prosecutor struck a juror for discriminatory reasons, courts engage in a three-step process: (1) the defendant makes a prima facie case of discrimination, (2) the prosecution offers race-neutral reasons for the strike, and (3) the trial court determines if the defense established purposeful discrimination. *Batson*, 476 U.S. at 96-98; *Miller-El v. Cockrell*, 537 U.S. 322, 328-29 (2003).

At the second step, "the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Hernandez v. New York*, 500 U.S. 352, 360 (1991). The second step "does not demand an explanation that is persuasive, or even plausible;" even "implausible or fantastic justifications" satisfy the second step. *Purkett v. Elem*, 514 U.S. 765, 767-68 (1995).

The trial court actually evaluates the given reasons during the third step. *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008). The proffer of a pretextual reason "naturally gives rise to an inference of discriminatory intent." *Id.* at 485.

Here, the trial court erred when it refused to conduct the third step. *See* Appx. J, 15. Despite this refusal, the Arizona Supreme Court affirmed Lynch's conviction, concluding the trial court

"implicitly" ruled that Lynch had not demonstrated an improper motivation behind the strike. *Lynch*, 357 P.3d 119, ¶ 70. However, Arizona has split with the bulk of jurisdictions regarding how appellate courts should handle a trial court's failure to engage in the third step. This Court's intervention is necessary to resolve an ongoing split amongst jurisdictions.

A. Because this Court has not yet indicated how lower courts should resolve the failure to conduct the third step of a *Batson* analysis, jurisdictions have created three different approaches: (1) independent review, (2) remand, and (3) deference to an implicit ruling.

This Court has not yet provided guidance as to the proper remedy when a trial court fails to conduct the third step of the *Batson* analysis. This has led to a split in how jurisdictions address such failures. *See* William Burgess & Douglas Smith, *The Proper Remedy for a Lack of* Batson *Findings: The Fall-Out from* Snyder v. Louisiana, 101 J. Crim. L. & Criminology 1, 2 (2011) (hereinafter "Burgess & Smith"); *State v. Scott*, 829 N.W.2d 458, ¶ 22 (S.D. 2013) (recognizing a "*Batson* violation usually compels reversal," but ordering a limited remand in light of other cases approving of such a process). Three different approaches have been used: (1) a de novo review by the appellate court and, when the record does not support a prosecutor's offered reasons, an order for a new trial; (2) an order remanding to the trial court for further findings; and (3) reliance upon the trial court's decision regardless of its failure to conduct the third step of *Batson*. Burgess & Smith, 13.

The first alternative is an independent review:

> Where a prosecutor's race-neutral explanation for a strike cannot be confirmed or rejected on the basis of the trial record, and where the trial court failed to make the required findings in the course of resolving a *Batson* objection to a peremptory strike, the Fifth and Eleventh Circuits have ordered new trials ....

Burgess & Smith, 13. The Ninth and Eleventh Circuits use this approach. *Green v. LaMarque*, 532 F.3d 1028, 1029-33 (9th Cir. 2008); *Jamerson v. Runnels*, 713 F.3d 1218, 1225 (9th Cir. 2013);

McGahee v. Alabama Dept. of Corrections, 560 F.3d 1252 (11th Cir. 2009); *Adkins v. Warden, Holman CF*, 710 F.3d 1241 (11th Cir. 2013).

In *McGahee*, the Eleventh Circuit reviewed the record and found "a strong prima facie case of intentional discrimination." *Id.* at 1267. The Court then evaluated the State's proffered reasons for exercising the peremptory strikes. *Id.* at 1267-68. Because the State's reasons were not supported by the record, the Eleventh Circuit vacated the conviction and ordered a new trial. *Id.* at 1268-70.

This is the remedy Lynch requested. In his briefing, Lynch discussed *Green*, Appx. B, 116, encouraged the Arizona Supreme Court to engage in an independent review, *id.* at 117-19, and asked the court to vacate his sentence, *id.* at 119-20.

Several jurisdictions have held the proper remedy is to remand the case to the trial court to perform the third step. *E.g. Dolphy v. Mantello*, 552 F.3d 236, 240 (2d Cir. 2009); *Coombs v. Diguglielmo*, 616 F.3d 255, 265 (3d Cir. 2010); *U.S. v. McAllister*, 693 F.3d 572, 582 (6th Cir. 2012); *U.S. v. McMath*, 559 F.3d 657, 666 (7th Cir. 2009); *Jones v. State*, 938 A.2d 626, 633 (Del. 2007); *People v. Davis*, 899 N.E.2d 238, 248-50 (Ill. 2008); *Edmonds v. State*, 812 A.2d 1034, 1048-49 (Md.App. 2002); *State v. Scott*, 829 N.W.2d 458, ¶22 (S.D. 2013). While Lynch encouraged the Arizona Supreme Court to conduct an independent review and reverse his conviction, Lynch also discussed several remand cases. *See* Appx. B, 112-18.

The third approach, endorsed sparingly, refuses a remedy even where the trial court fails to comply with *Batson*. Burgess & Smith, 20. The Eighth Circuit endorses this approach. *Id.* In *Smulls v. Roper*, the Eighth Circuit concluded *Batson* rulings are inherently factual and there is no requirement for trial courts to place their reasons on the record. 535 F.3d 853, 860 (8th Cir. 2008). The Court reasoned that by announcing a decision, the trial court made implicit findings. *Id.*

The Arizona Supreme Court chose the third option and relied upon an implicit trial court ruling. *See Lynch*, 357 P.3d 119, ¶ 70. However, by deferring to an absent ruling and depriving the challenging party any opportunity to participate in the third step of *Batson*, the Arizona Court endorsed the most constitutionally infirm option.

B. To resolve this split, this Court should clarify that where a trial court has failed to follow *Batson v. Kentucky*, appellate courts must independently review the record and order a new trial when the record does not support a prosecutor's proffered race-neutral reasons.

This Court should order appellate courts to engage in a de novo review of the record and order new trials where a prosecutor's reasons are not supported by the record. This approach best aligns with *Batson*, protects against post hoc justifications and endless judicial proceedings, and incentivizes proper trial court procedure.

At a minimum, this Court should require remand. Such a process is less consistent with *Batson* and risks reliance upon post hoc justifications and ongoing judicial proceedings. But remand at least recognizes that deference requires a prior decision and ensures defendants an opportunity to rebut the prosecutor's offered reasons.

Implicit rulings should be rejected. Implicit rulings rob defendants of the ability to rebut a prosecutor's proffered justifications, sidestep the stated requirements of *Batson*, and circumvent the core purpose of *Batson*. Ultimately, implicit rulings create the very system Justice Marshall warned against—a system wherein a prosecutor can use peremptory strikes in a discriminatory manner so long as the prosecutor can invent a race-neutral reason for the strike, regardless of how incredible or preposterous that reason might be.

1. **Independent review of a prosecutor's proffered reasons and reversal where the reasons are not supported by the record, best comports with a defendant's due process right and the public's equal protection right.**

Between the three alternatives, independent review is the most preferable. Independent review closely aligns with *Batson*, avoids prosecutorial use of post-hoc justifications, protects against endless judicial proceedings, and provides an incentive to follow proper procedure. *See* Burgess & Smith, 22-29.

First, independent review aligns with this Court's conclusion that *Batson* supports automatic reversal. In *Rivera v. Illinois*, this Court reviewed a trial court's improper denial of a defendant's peremptory strike. 556 U.S. 148, 151 (2009). As a remedy, the defendant asked for automatic reversal, a remedy this Court rejected. *Id.* at 156. This Court differentiated the improper denial of a peremptory strike and *Batson*. *Id.* at 161. *Batson* as automatic reversal precedent because *Batson* is a constitutional error; improper denial of a peremptory strike is not. *Id.*

More recently, in *Snyder v. Louisiana*, 552 U.S. 472 (2008), this Court conducted an independent review. In *Snyder*, this Court evaluated a prosecutor's proffered race-neutral reasons for a strike, *id.* at 477-79, independently reviewed the record to determine if the prosecutor's reasons were supported, *id.* at 478-84, and found the prosecutor's reasons implausible and pretextual, *id.* at 483-85. This Court also concluded that any remaining subtle question regarding the juror's nervousness could not be answered by remand years later. *Id.* at 486.

Many courts have read *Snyder* "as imposing a broad and general command regarding the proper relief when there is an absence of *Batson* findings." Burgess & Smith, 13. Even before *Snyder* though, "several ... state and federal courts ha[d] ordered new trials when confronted with a situation in which the trial judge ... failed to make the required findings and overruled a defendant's *Batson* objection with little or no comment." *Id.* at 17. "These courts have held that a new trial is a

natural extension of the *Batson* framework and is the appropriate remedy where a trial court fails to make required findings." *Id.*

Second, independent review avoids post hoc justifications. *See id.* at 24-25. The review is isolated to the record. Prosecutors cannot supplement additional justifications, either on appeal or remand. The Second Circuit, a remand jurisdiction, recognizes that delaying a *Batson* claim "risks infecting what would have been the prosecutor's spontaneous explanations with contrived rationalizations, and may create a subtle pressure for even the most conscientious district judge to accept explanations of borderline plausibility to avoid the only relief then available, a new trial." *U.S. v. Biaggi*, 909 F.2d 662, 679 (2d Cir. 1990); *see also Gray v. State*, 562 A.2d 1278, 1284 (Md.App. 1989) (recognizing "the passage of considerable time between the event and the attempt at reconstruction" may increase the "danger of perfectly innocent confabulation"). The danger of post hoc justification "is perhaps even greater" on remand, at which point "the court is essentially inviting the prosecution to come up with new evidence that was not presented during the original trial, and potentially new theories, justifying the prior exercise of a peremptory challenge." Burgess & Smith, 26-27.

Third, independent review avoids ongoing judicial proceedings at the trial and appellate levels. *Id.* at 25-28. Remand requires additional proceedings before the trial court. But "such remand proceedings can often take on lives of their own and expend more judicial resources than a new trial." *Id.* at 27. At its simplest, a second appeal on the remand hearing would still be necessary.

These concerns, though, are remedied by independent review because "a bright-line rule requiring a new trial in every case in which a trial court fails to make sufficient *Batson* findings to permit appellate review would provide an ex ante incentive to trial judges and prosecutors to be

more conscientious and would give effect to the principle underlying *Batson*." *Id.* at 28. Trial courts and prosecutors would pay greater heed to *Batson* and would ensure compliance. *Id.* at 29.

2. While remand inadequately protects a defendant's due process right and the public's equal protection right, remand provides more protections than reliance upon an "implicit" ruling.

Remand does not provide the same protection to harmed parties. Remand does little to encourage compliance with *Batson*; remand creates a need for ongoing judicial involvement at both the trial and appellate levels; and remand provides an opportunity for—and even incentivizes—reliance upon post hoc justifications.

With all of its shortcomings, however, remand at least provides more protection than the implicit rulings approach, as illustrated in *U.S. v. Rutledge*, 648 F.3d 555 (7th Cir. 2011). In *Rutledge* the trial court denied the *Batson* challenge "after saying that the government's reasons were 'nonracial,' but without making any finding on the prosecutor's credibility." *Id.* at 557. The Seventh Circuit refused to presume a justification was credible "simply because the district judge ultimately denied the challenge." *Id.* (quoting *U.S. v. McMath*, 559 F.3d 657, 666 (7th Cir. 2009)). While deference would normally be given to the trial court, "if there is nothing in the record reflecting the trial court's decision, then there is nothing to which we can defer." *Id.* at 558-59. The Seventh Circuit concluded an evidentiary gap existed which required remand. *Id.* at 560. The Sixth Circuit came to the same conclusion in *U.S. v. McAllister*, 693 F.3d 572, 581-82 (6th Cir. 2012).

Independent review and remand both recognize that deference cannot be given to an absent ruling. But the third approach does just that, defer to an inferred ruling. As will be discussed below, independent review and remand also both ensure challenging parties have the opportunity to participate in the third *Batson* step, either through the appellate or remand process. Deference to an

"implicit" ruling, however, ignores the true expanse of the third *Batson* step and deprives the challenging party an opportunity to be heard.

3. The implicit ruling approach is inconsistent with *Batson* and does not protect litigants.

While remand does not provide the same degree of protection as independent review, either is preferable to the alternative taken by the Arizona Supreme Court—the implicit ruling approach. The implicit ruling approach is the least consistent with *Batson*, ignores the full nature of *Batson*'s third step, and is accompanied by pragmatic difficulties.

In *Batson*, this Court held that prosecutors should not be permitted to rebut a discriminatory motive by merely asserting good faith. *Batson*, 476 U.S. at 98. Similarly, a prosecutor may not excuse discriminatory strikes by giving pretextual justifications. *Miller-El v. Dretke*, 545 U.S. 231, 252 (2005).

Initially, some courts considered pretext and plausibility during the second step. *See Purkett*, 514 U.S. at 768. But in *Purkett*, this Court clarified that the second stage was not the proper time. *Id.* "[I]mplausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination" at the third stage. *Id.* There is a difference between when "a trial judge may choose to disbelieve a silly or superstitious reason at step three" and when "a trial judge must terminate the inquiry at step two." *Id.*

By circumventing the third step, the Arizona Supreme Court has rendered *Batson*'s protection meaningless. A trial court must accept a prosecutor's silly, implausible, and fantastic reasons without regard to pretext. If a trial court then, as here, ignores *Batson*'s third step, pretextual reasons satisfy legitimate challenge. Such a circumstance "reduces the *Batson* analysis to a superficial check only for the most egregious forms of discrimination." Joshua E. Swift, Batson*'s*

Invidious Legacy: Discriminatory Juror Exclusion and the "Intuitive" Peremptory Challenge, 78 Cornell L. Rev. 336, 356 (1993).

Such a system also realizes the very criticism levied by Justice Marshall. Because any silly, fantastic, and implausible reason can satisfy the second step, the only protection exists in the third step. If trial courts side-step the most crucial portion of the *Batson* mandate, "Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons." *Batson*, 476 U.S. at 106 (J. Marshall, dissenting).

The implicit ruling approach also ignores the full nature of *Batson*'s third step. The third step is not conducted just by the trial court. Rather, during the third step, the defense should be given an opportunity to rebut the prosecutor's proffered race-neutral reasons. While rebuttal may not be mandatory in every federal circuit, it is advised in every federal circuit. *See* Mikal C. Watts & Emily C. Jeffcott, *A Primer on* Batson, *Including Discussion of* Johnson v. California, Miller-El v. Dretke, Rice v. Collins, & Snyder v. Louisiana, 42 St. Mary's L.J. 337, 357-409 (2011) (reviewing the "Practical Application" of *Batson* in each circuit and advising the challenging party rebut the proffered race-neutral reasons in each circuit).

Several circuits have explicitly recognized the challenging party's role. In the Second Circuit, a third-step decision is improper unless the trial court offered the challenging party "time to identify the relevant facts and assess the circumstances necessary to decide whether the race neutral reasons given were credible and nonpretextual." *Jordan v. Lefevre*, 206 F.3d 196, 201 (2d Cir. 2000). In the Fourth Circuit, after the striking party offers a race-neutral reason, the burden shifts back to the opposing party "to prove that the explanations given were pretext for discrimination ...." *U.S. v. Farrior*, 535 F.3d 210, 221 (4th Cir. 2008). The Sixth Circuit also requires an opportunity to "demonstrate that the purported explanation is merely a pretext for a racial motivation." *McCurdy v.*

Montgomery County, Ohio, 240 F.3d 512, 521 (6th Cir. 2001). While the Ninth Circuit does not require such an opportunity, "it seems wise for courts to allow counsel to argue, if only to remove some of the burden of record evaluation from the court." *Lewis v. Lewis*, 321 F.3d 824, 835 fn.27 (9th Cir. 2003).

Indeed, a defendant's failure to challenge a prosecutor's proffered reasons could weigh against the defendant. *See Miller-El v. Dretke*, 545 U.S. 231, 278 (Thomas, J., dissenting) ("Miller-El did not even attempt to rebut the State's racially neutral reasons at the hearing. He presented no evidence and made no arguments."); *Gonzalez v. Brown*, 585 F.3d 1202, 1209 (9th Cir. 2009) (noting the defendant "could 'point to no other factors other than [the first juror's race] which suggested that she was excused on [a racial] basis alone.'"). Some circuits even consider a *Batson* claim waived if the defendant did not dispute the prosecutor's proffered reason. *See U.S. v. Rudas*, 905 F.2d 38, 41 (2d Cir. 1990); *Davis v. Baltimore Gas and Elec. Co.*, 160 F.3d 1023, 1027-28 (4th Cir. 1998); *U.S. v. Arce*, 997 F.2d 1123, 1127 (5th Cir. 1993).

Finally, there is a single overarching pragmatic problem that cannot be solved by the implicit ruling approach: "if there is nothing in the record reflecting the trial court's decision, then there is nothing to which we can defer." *Rutledge*, 648 F.3d at 559. This is a fundamental tenet that unites the vast majority of jurisdictions applying either the independent review or remand alternative. *See McAllister*, 693 F.3d 582 (6th Circuit ordering remand; refusing to grant deference where "the record is unclear as to whether the district court engaged in the third step of *Batson*"); *Green*, 532 F.3d at 1031 (9th Circuit applying independent review, refusing to "presume the trial court found the prosecutor's race-neutral reasons ... to be genuine"); *McGahee*, 560 F.3d at 1266 (11th Circuit applying independent review, reviewing de novo).

The implicit ruling approach is inconsistent with *Batson*, ignores the full scope of *Batson*'s third step, and improperly provides deference to absent rulings. The implicit ruling approach is not consistent with due process or equal protections. Accordingly, the Arizona Supreme Court violated Lynch's, and the public's right under the Equal Protection Clause when it relied upon an implicit ruling it read into the record.

C. Applying the correct test—independent review—this Court should vacate Lynch's sentence.

Under the correct review standard, this Court should vacate Lynch's sentence. Nothing in the record supports the prosecutor's claimed reasons. Nothing confirms Juror 32 had long hair and was unkempt, or that Juror 34 had tattoos. Moreover, the prosecutor's conduct never indicated he actually had concerns about tattoos or facial hair.

A prosecutor's failure to question prospective jurors on issues later relied upon to support strikes indicates a discriminatory intent. *Miller-El v. Dretke*, 545 U.S. 231, 244-45 (2005); *Smith v. Cain*, 708 F.3d 628, 636 (5th Cir. 2013); *Parker v. Allen*, 565 F.3d 1258, 1271 (11th Cir. 2009). Here, the prosecutor never questioned any jury panel regarding tattoos or hair styles. Although he personally questioned Jurors 32 and 34, the prosecutor never asked these jurors about tattoos, hair styles, or hygiene. *See* Appx. H, 130, 151-53, 222, 230. Upon apparently seeing an exposed tattoo, the prosecutor never requested an opportunity to ask additional questions. Appx. J, 6.

The record also affirmatively disproves one of the prosecutor's proffered reasons regarding Juror 32. The prosecutor argued he asked the trial court to strike Juror 299 because of the juror's grooming. *Id.* at 13-14. But the record does not support this claim. *See* Appx. I, 128-29. Instead, the prosecutor moved to strike Juror 299 because of the 299's attitudes toward lying. *Id.* Juror 299's grooming was never mentioned. *See id.*

If the prosecutor's race-neutral justifications—tattoos, hairstyles, and grooming—were legitimate, the prosecutor would have questioned someone about the topic during voir dire. He never did. Moreover, the prosecutor would not have misrepresented his reasons for moving to strike a different juror for cause. Nothing in the record supports the prosecutor's proffered race-neutral justifications for his peremptory strikes.

The Arizona Supreme Court excused the prosecutor's misconduct by relying upon a single Arizona case which upheld a prosecutor's strikes even though the prosecutor had not conducted any voir dire on the topic. *See Lynch*, 357 P.3d 119, ¶ 70 (relying upon *State v. Canez*, 42 P.3d 564, ¶ 18 (Ariz. 2002)). First, *Canez* predates *Miller-El v. Dretke*, wherein this Court focused upon the prosecutor's failure to ask follow-up questions as evidence of pretext. 545 U.S. at 244-45 (2005). Moreover, the prosecutor's failure to follow-up had nothing to do with the resolution of *Canez*; *Canez* was affirmed because the juror in question gave inconsistent answers regarding education and employment. *Canez*, 42 P.3d 564, ¶ 26.

Finally, even if the failure to ask follow-up questions is not per se pretext, it is sufficient evidence of pretext in this case. The prosecutor's reasons are the same as those this Court already labeled as silly, fantastic, and implausible. In *Purkett*, this Court addressed a prosecutor's strike of a juror based on the juror's long, unkempt hair and facial hair. 514 U.S. at 766. Discussing the importance of the third step, justifications of this sort were considered silly, implausible, and fantastic. *Id.* at 768. This Court merely found that silly, implausible, and fantastic justifications satisfied the second step. *Id.*

But where a prosecutor offers an implausible justification, never conducts any follow-up to indicate the implausible justification was genuinely held, the record does not support the strike, and the record actively disputes the prosecutor's support for his position, the justification is pretextual.

CONCLUSION

If a trial court's ruling that a prosecutor has offered race-neutral reasons to justify a strike—reasons which need not even be credible—constitutes an implicit application of *Batson*'s third step, the third step is rendered meaningless and the protection afforded by *Batson* and the Equal Protection Clause are inert. This approach brings about the very system feared by Justice Marshall. A prosecutor can overcome *Batson* by merely inventing any race-neutral reason for the strike, regardless of how silly, fantastic, or implausible that reason is.

The proper remedy for such a failure is to conduct an independent review of the record and reverse the conviction or sentence where the record does not support the prosecutor's proffered race-neutral justifications. Applying the proper remedy, this Court should vacate Lynch's sentence. At a minimum, *Batson* requires a remand so the third prong can actually be conducted.

II. Because Shawn Lynch was ineligible for parole and the prosecution placed Lynch's future dangerousness at issue, Lynch was entitled to an instruction on parole ineligibility under *Simmons v. South Carolina* and the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. To justify the trial court's refusal to read a *Simmons* instruction, the Arizona Supreme Court relied upon the availability of clemency—a form of release irrelevant to *Simmons*.

In *Simmons v. South Carolina*, this Court considered a defendant's request to instruct the jury regarding his parole ineligibility if sentenced to life imprisonment under the Due Process Clause of the Fourteenth Amendment. 512 U.S. 154, 156 (1994). This Court held, "In assessing future dangerousness, the actual duration of the defendant's prison sentence is indisputably relevant." *Id.* at 163. "Because truthful information of parole ineligibility allows the defendant to 'deny or explain' the showing of future dangerousness, due process plainly requires that he be allowed to bring it to the jury's attention by way of argument by defense counsel or an instruction from the court." *Id.* at 169.

A *Simmons* instruction is appropriate even where future dangerousness is "a logical inference from the evidence" or "injected into the case" by the prosecutor. *Kelly v. South Carolina*, 534 U.S. 246, 252-53 (2002).

A. Lynch was entitled to a *Simmons* instruction; Lynch was not eligible for parole and future dangerousness was at issue.

The Arizona Supreme Court correctly found, "[t]he State suggested at trial that Lynch could be dangerous." *Lynch*, 357 P.3d 119, ¶ 64. The Court also correctly concluded Lynch was not eligible for parole because parole was abolished in 1994. *Id.* Because Lynch was not eligible for parole and future dangerousness was at issue, a *Simmons* instruction should have been read.

Notwithstanding the fact that Lynch satisfied both conditions set forth in *Simmons*, the Arizona Supreme Court ruled a *Simmons* instruction was unnecessary. *Lynch*, 357 P.3d 119, ¶ 65. This error is particularly egregious because the preliminary instructions incorrectly suggested parole was available. Appx. R ("Life without the possibility of release ... means ... [Lynch] will not be eligible for parole ...."). To reach this conclusion the Court relied upon a different and irrelevant form of release—clemency. *Lynch*, 357 P.3d 119, ¶ 65.

B. The availability of executive clemency does not alter the requirements of *Simmons*.

The remaining form of release, executive clemency, is not of sufficient constitutional import to deviate from *Simmons*. However, the Arizona Supreme Court relied upon clemency to conclude, "Because § 13-703(A) permitted the possibility of Lynch obtaining release, refusing a *Simmons* instruction was not error." *Id.*

But this Court has repeatedly recognized the fundamental difference between parole, a standard deviation upon a sentence, and clemency, an ad hoc exercise of executive grace. Indeed, this Court rejected an identical argument in *Simmons*. *Simmons*, 512 U.S. at 166 (finding reliance

upon "future exigencies such as legislative reform, commutation, clemency, and escape" have "little force")

This holding reflects this Court's long-standing recognition that parole is uniquely different from clemency. *See Solem v. Helm*, 463 U.S. 277 (1983). "Parole is a regular part of the rehabilitative process" with legally established standards. *Id.* at 300. "Commutation, on the other hand, is an ad hoc exercise of executive clemency. A Governor may commute a sentence at any time for any reason without reference to any standards." *Id.* at 301. In *Solem*, this Court refused to give weight to the "bare possibility" of clemency, as that "would make judicial review under the Eighth Amendment meaningless." *Id.* at 303.

The Arizona Supreme Court disregarded this well-established jurisprudence and relied, instead, upon a single sentence from *Ramdass v. Angelone*, 530 U.S. 156, 169 (2000). *See Lynch*, 357 P.3d 119, ¶ 65. The Court correctly quoted *Ramdass* for the proposition, "*Simmons* applies only to instances where, as a legal matter, there is no possibility of parole if the jury decides the appropriate sentence is life in prison." *Id.* (quoting *Ramdass*, 530 U.S. at 169; emphasis by Arizona Supreme Court). In direct contravention of this Court's holdings, the Arizona Supreme Court ignored that eligibility for clemency is not a "possibility of parole."

C. Beyond an instruction, the trial court's ruling interfered with Lynch's right to present a complete defense.

The due process clause also guarantees defendants the opportunity to present a complete defense. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). "Where the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty," the due process clause requires "that a defendant not be sentenced to death on the basis of information which he had no opportunity to deny or explain." *Skipper v. South Carolina*, 476 U.S. 1, 5 n.1 (1986) (internal quotation marks omitted). This was the heart of this Court's decision in *Simmons*: "sending a man to his death on the

basis of information which he had no opportunity to deny or explain violate[s] fundamental notions of due process." *Simmons*, 512 U.S. at 164 (internal quotation marks omitted).

Justice O'Connor, with whom Chief Justice Rehnquist and Justice Kennedy joined, concluded the Due Process clause required that defendants have the opportunity to "meet the State's case against him." *Id.* at 175 (O'Connor, J., concurring); *see also id.* at 174 (Ginsburg, J., concurring). When the prosecution relies upon future dangerousness, due process requires that the defendant be permitted to introduce evidence combatting the claim. *Id.* at 175 (O'Connor, J., concurring). Thus, "the defendant should be allowed to bring his parole ineligibility to the jury's attention—by way of argument by defense counsel or an instruction from the court—as a means of responding to the State's showing of future dangerousness." *Id.*

At a minimum, due process required that Lynch have the ability to inform the jury of his parole ineligibility in some manner. But the procedural history in this case precluded Lynch from introducing his parole ineligibility. The trial court's 2005 ruling precluded Lynch from introducing his parole ineligibility through testimony or argument. The 2012 ruling denied an instruction. The prosecution was permitted to introduce evidence and argument of future dangerousness; Lynch was not permitted to meet the evidence against him.

D. The Eighth Amendment supports a *Simmons* instruction.

In *Simmons* this Court limited its decision to the due process clause, "express[ing] no opinion on the question whether the result we reach today is also compelled by the Eighth Amendment." *Id.* at 162 fn.4, 2193 fn.4. Justice Souter, however, linked the decision to the Eighth Amendment's requirement "for reliability in the determination that death is the appropriate punishment in a specific case." *Id.* at 172 (Souter, J., concurring) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)). The Eighth Amendment's protection against cruel and unusual punishment guarantees

capital defendants the right to an individualized sentencing. *Eddings v. Oklahoma*, 455 U.S. 104, 105, 112 (1982). Thus, the denial of a *Simmons* instruction not only violated Lynch's due process rights, the denial also violated Lynch's right to a reliable and individualized sentence under the Eighth Amendment.

E. Arizona has a long history of ignoring and refusing to apply *Simmons v. South Carolina*.

The Arizona Supreme Court's error is also not an isolated one driven by unique facts; the Arizona Supreme Court has steadfastly refused to apply *Simmons*. Instead, the Court has repeatedly relied upon the availability of "release" to circumvent *Simmons*, ignoring that the form of "release" available is not constitutionally adequate to justify departure from *Simmons*.

For example, in *State v. Cota*, the defendant was charged with murder after Arizona abolished parole in 1994. 272 P.3d 1027, ¶¶ 2-4 (Ariz. 2012) (murder occurred in 2003). The defense argued, "the trial court erred by instructing the jury that a life sentence might allow for release after twenty-five years, because he is not eligible for parole ...." *Id.* at ¶ 75. The Arizona Supreme Court noted this argument conflated parole and release. *Id.* Because the defendant could have been eligible for executive clemency, the Court found the instruction accurately stated the law. *Id.* at ¶¶ 75-76.

This same misinterpretation has been used to circumvent *Simmons* in several Arizona capital cases after parole was abolished. The murder in *State v. Hargrave* came after Arizona abolished parole. 234 P.3d 569, ¶¶ 1-6 (Ariz. 2010) (murder occurred in 2002). Relying on *Simmons*, the defendant argued the trial court improperly advised the jury that he could be released after 25 years. *Id.* at ¶¶ 50-52. The Arizona Supreme Court rejected this argument and distinguished *Simmons*, because, "Hargrave was eligible <u>for release</u> after twenty-five years." *Id.* at ¶ 53 (emphasis added).

State v. Chappel also occurred after parole had been abolished. 236 P.3d 1176, ¶¶ 3-7 (Ariz. 2010) (murder occurred 2003). Relying on *Simmons*, the defendant argued the instructions misled the jury to believe parole was available. *Id.* at ¶ 43. The Court concluded his reliance on *Simmons* was "unavailing because Chappel was eligible for release." *Id.* (emphasis added).

State v. Hardy also post-dated the abolition of parole. 283 P.3d 12, ¶¶ 2-9 (Ariz. 2012) (murder occurred in 2005). The defendant asked for a *Simmons* instruction, which was rejected. *Id.* at ¶ 56. The Arizona Supreme Court affirmed this decision. *Id.* at ¶ 58. While the Supreme Court correctly noted that *Simmons* focused on parole, the Court relied upon the availability of "release after twenty-five years" to distinguish *Simmons*. *Id.* (emphasis added).

CONCLUSION

Lynch was not eligible for parole and the prosecution placed Lynch's future dangerousness at issue. At that point, a *Simmons* instruction was necessary to give effect to Lynch's Due Process right. But rather than overturn Lynch's sentence, the Arizona Supreme Court doubled down on its prior incorrect decisions regarding *Simmons*. Despite this Court's repeated guidance that executive clemency is constitutionally different from parole, and despite this Court's clear rulings that clemency does not obviate the need for a *Simmons* instruction, the Arizona Supreme Court again held that a defendant is not entitled to a *Simmons* instruction when the only available release mechanism is clemency. This is not a one-time oversight by the Arizona Supreme Court—the Court has now relied upon clemency to evade *Simmons* on several occasions. Because a *Simmons* instruction should have been given and the Arizona Supreme Court has repeatedly ignored this Court's mandate, this Court should vacate Lynch's death sentence.

III. Shawn Lynch's Due Process right to a fair and reliable capital penalty phase, guaranteed by the Fifth and Fourteenth Amendments, was violated by the prosecutor's repeated and persistent misconduct.

Juan Martinez had a history of misconduct. By the time he prosecuted Shawn Lynch's penalty retrial, Martinez's misconduct had been found by the Arizona Supreme Court at least twice. But the Court always found standard instructions cured Martinez's misconduct. Thus, Martinez never had any incentive to correct his misbehavior.

Unsurprisingly, Martinez's misconduct was not only repeated in Lynch's penalty retrial—the misconduct surged. Where Martinez had previously committed misconduct on a handful of occasions in a trial, Martinez employed improper tactics on seventeen occasions in Lynch's sentencing.

Misconduct violates the very core of a prosecutor's duty. While a prosecutor "may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. U.S.*, 295 U.S. 78, 88 (1935). Moreover, rampant prosecutorial misconduct is inconsistent with Lynch's right to a fair and reliable trial—a right guaranteed by the due process clause and rendered more important by death eligibility.

A. Lynch was denied his right to a reliable death decision by the constant and repeated misconduct in this case.

Lynch, like all defendants, is guaranteed due process under the Fifth and Fourteenth Amendments. The Due Process clauses assure the right to a fair trial. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). A fair trial, by its nature, is a reliable one. *Nichols v. U.S.*, 511 U.S. 738, 762 (1994); *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Estes v. State of Texas*, 381 U.S. 532, 583 (1965). The right to a fair and reliable trial takes on more importance in the context of death

decisions. Death, as the most severe punishment, uniquely requires reliability. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

Prosecutorial misconduct can "so [infect a] trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). While insignificant misconduct is tolerated, *Greer v. Miller*, 483 U.S. 756, 765 (1987), the misconduct in this case undermines the verdict's reliability.

As discussed above, the Arizona Supreme Court found at least seventeen instances, and eight categories, of misconduct. During opening statements, the prosecutor argued Lynch wanted to "pull at [the jury's] heart strings," *Lynch*, 357 P.3d 119, ¶ 8, and encouraged the jury to place themselves in the victim's shoes, *id.* at ¶¶ 47-49. During examination of a defense expert, the prosecutor suggested the witness could "vouch for people," *id.* at ¶ 15, and twice misstated the evidence, *id.* at ¶ 25. During closing argument, the prosecutor placed the prestige of the government at issue, *id.* at ¶ 32, and misstated the law, *id.* at ¶ 37.

In each instance, the State introduced irrelevant considerations. The "pull at heart strings" comment introduced a prejudice against the defense. The "vouch for people" comment accused the expert witness through mischaracterization. Misstatements of the evidence and law introduced incorrect assertions of fact and law into the jury's minds. The prosecutor also encouraged the jury to consider the evidence as supported by the imprimatur of the State. *See U.S. v. Young*, 470 U.S. 1, 18-19 (1985). Finally, by asking the jury to place themselves in the victim's shoes, the prosecutor encouraged the jury to consider their personal fears and passions.

Because the misconduct in this case directly sought to encourage the jury to rest its decision upon improper grounds—appeals to emotion and mischaracterizations of law and evidence—the misconduct undercuts the reliability of the jury's verdict.

B. Lynch was deprived a fair and reliable trial when he was prosecuted by an attorney who has repeatedly obtained convictions through misconduct.

A defendant's right to a fair trial imposes a duty to ensure that justice is done. *Cone v. Bell*, 556 U.S. 449, 451 (2009). Thus, prosecutors must promote justice, not win at all costs. *Connick v. Thompson*, 563 U.S. 51, 71 (2011). "It is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. U.S.*, 295 U.S. 78, 88 (1935). As indicated above, prosecutorial misconduct undermines a defendant's right to a fair and reliable trial.

But Lynch's right to a fair and reliable trial was further undercut by a systemic factor beyond his control: he was prosecuted by an attorney who has repeatedly committed misconduct. Had a different attorney—a more ethical attorney—been assigned, the tenor of Lynch's trial would have been very different. A more ethical prosecutor would not have argued during opening statements, improperly attacked Lynch's experts, misstated the evidence or evidence, vouched during closing argument, or encouraged the jury to place themselves in the victim's shoes. Instead, Lynch's trial was doomed from the start.

The Arizona Supreme Court has dealt with the assigned prosecutor, Juan Martinez, on several prior occasions. In *State v. Morris*, the Arizona Supreme Court found Martinez improperly encouraged the jurors to place themselves in the victim's position. 160 P.3d 203, ¶ 58 (Ariz. 2007). In *State v. Gallardo*, the Arizona Supreme Court concluded Martinez improperly attacked a defense expert and mischaracterized evidence regarding fees. 242 P.3d 159, ¶ 44 (2010). The Court, however, tolerated the misconduct in both cases. As a result, Martinez repeated both types of misconduct in this case.

Juan Martinez's repeated misconduct even became a topic during oral argument in *Gallardo*.[1] *See* Appx. E, 8. Arizona Justice Ryan recalled Martinez's misconduct from several cases. *See id.* Justice Hurwitz joined, asking expressly about improper personalization. *Id.*

To secure convictions and death sentences, Juan Martinez uses improper tactics. While the Arizona Supreme Court has repeatedly found Martinez's conduct improper in opinions, the Court has done nothing to actually reign in his misconduct. Predictably, Martinez again resorted to misconduct in Lynch's case. Martinez again misrepresented the facts and law and asked the jury to place themselves in the victim's shoes.

Martinez does not seek justice; he pursues death verdicts with unethical vigor. And this pursuit has pulled Lynch in its wake. Lynch's death verdict was not the product of a fair and reliable proceeding. Lynch's death verdict was the result of a prosecutor who has realized he can advocate far beyond the boundaries of fairness because the Arizona Supreme Court will do nothing to stop him.

CONCLUSION

Under the Due Process clauses of the Fifth and Fourteenth Amendments, Lynch had a right to a fair and reliable sentencing trial. But this right was deprived by the foreseeable actions of a prosecutor whose misconduct has been emboldened by an Arizona Supreme Court that has refused to act upon rampant misconduct. Not only did Martinez commit misconduct in this case, he repeated the very sorts of misconduct the Arizona Supreme Court admonished him for in the past. Yet the Supreme Court did nothing.

In light of the misconduct, and the weight that should be assigned to misconduct that encourages the jury to improperly decide a case, this Court should vacate Lynch's death sentence.

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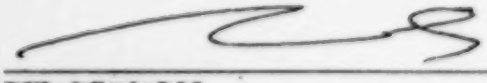
[1] The Arizona Supreme Court retains videos for oral arguments on its website, at https://www.azcourts.gov/AZ-Supreme-Court/Live-Archived-Video. The recitation of the oral argument provided in the Motion for Reconsideration (Appx. E) was taken from this website.

Respectfully submitted this 25th day of February, 2016.

MARICOPA COUNTY PUBLIC DEFENDER

By 

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No. _____

IN THE

Supreme Court of the United States

SHAWN PATRICK LYNCH,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE ARIZONA SUPREME COURT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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LIST OF APPENDICES

Appendix A	*State v. Lynch*, 357 P.3d 119 (Ariz. 2015).
Appendix B	Opening Brief.
Appendix C	Answering Brief.
Appendix D	Reply Brief.
Appendix E	Motion for Reconsideration.
Appendix F	Arizona Supreme Court Order Denying Motion for Reconsideration.
Appendix G	Minute Entry for July 10, 2012, indicating presence of prospective jurors 32 and 34. Instrument 709.
Appendix H	Pertinent portions of Reporter's Transcript 7/10/2012.
Appendix I	Pertinent portions of Reporter's Transcript 7/16/2012.
Appendix J	Pertinent portions of Reporter's Transcript 7/17/2012.
Appendix K	State's Motion to Preclude Testimony Concerning Availability of Parole. Instrument 226.
Appendix L	Minute Entry for October 18, 20015, granting State's Motion to Preclude Testimony Concerning Availability of Parole. Instrument 274.
Appendix M	Opening Brief for Lynch's first appeal, reported at *State v. Lynch*, 234 P.3d 595 (Ariz. 2010). Opening Brief is also available at 2008 WL 6587570.
Appendix N	Defendant's Waiver of Right to be Considered for Release-Eligible Sentence and Motion for Jury Instruction Regarding Release Ineligibility (*Simmons* Instruction). Instrument 650.
Appendix O	Objection to Defendant's Waiver of Right to be Considered for Release-Eligible Sentence and Motion for Jury Instruction Regarding Release Ineligibility (*Simmons* Instruction). Instrument 663.
Appendix P	Pertinent portions of Reporter's Transcript 4/6/2012.
Appendix Q	Minute Entry for April 20, 2012, denying Defendant's Waiver of Right to be Considered for Release-Eligible Sentence and Motion for Jury Instruction Regarding Release Ineligibility (*Simmons* Instruction). Instrument 684.

Appendix R Preliminary Instructions. Instrument 714.

Appendix S Final Instructions. Instrument 779.

Respectfully submitted this 25th day of February, 2016.

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APPENDIX – A –

IN THE

SUPREME COURT OF THE STATE OF ARIZONA

STATE OF ARIZONA,
Appellee,

v.

SHAWN PATRICK LYNCH,
Appellant.

No. CR-12-0359-AP
Filed September 10, 2015

Appeal from the Superior Court in Maricopa County
The Honorable Karen L. O'Connor, Judge
No. CR2001-092032
AFFIRMED

COUNSEL:

Mark Brnovich, Arizona Attorney General, John R. Lopez IV, Solicitor General, Lacey Stover Gard (argued), Chief Counsel, Capital Litigation Section, Jeffrey L. Sparks, Assistant Attorney General, Tucson, Attorneys for State of Arizona

Tennie B. Martin, Mikel Steinfeld (argued), Deputy Public Defenders, Phoenix, Attorneys for Shawn Patrick Lynch

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JUSTICE BRUTINEL authored the opinion of the Court, in which CHIEF JUSTICE BALES, VICE CHIEF JUSTICE PELANDER, and JUSTICES BERCH and TIMMER joined.

JUSTICE BRUTINEL, opinion of the Court:

¶1 Shawn Patrick Lynch was convicted of first-degree murder, kidnapping, armed robbery, and burglary. He was sentenced to death for the murder and to twenty-one years' imprisonment for the other offenses. We remanded for a new penalty-phase proceeding on the murder conviction in *State v. Lynch* (*Lynch I*), 225 Ariz. 27, 43 ¶ 89, 234 P.3d 595, 611 (2010). On resentencing, the jury again returned a death verdict. We have jurisdiction over this automatic appeal pursuant to Article 6, Section 5(3) of the Arizona Constitution and A.R.S. §§ 13-755 and 13-4031.

I. FACTUAL BACKGROUND

¶2 The victim, James Panzarella, was seen at a Scottsdale bar with Lynch and Michael Sehwani on March 24, 2001. Lynch, Sehwani, and Panzarella went to Panzarella's residence early the next morning. Later that morning, Sehwani used Panzarella's American Express card at a supermarket. Ten minutes later, the card was reported lost. Sehwani again used the card at a convenience store and unsuccessfully attempted to use it at a department store. The same day, Panzarella's Bank One card was used at a restaurant, a convenience store, and a motel. The Bank One card was used the following day to make a cash withdrawal and various purchases, including Everlast shoes.

¶3 The next afternoon, Panzarella was found in his home tied to a chair with his throat slit. Police also found credit card receipts from purchases made that morning at a supermarket and convenience store.

¶4 Police arrested Lynch and Sehwani that afternoon as they entered a truck in a motel parking lot. Sehwani was wearing Everlast shoes and had Panzarella's credit cards and checks in his wallet. In the truck and a motel room, police found keys to Panzarella's car, a sweater with Panzarella's blood on it, and a .45 caliber pistol belonging to Panzarella. Blood on Lynch's shoes matched Panzarella's DNA.

¶5 A jury found Lynch guilty of first-degree murder, armed robbery, burglary, and kidnapping. In his first aggravation-phase trial, the jury made separate findings that the murder was especially heinous and cruel, but could not agree on whether it was especially depraved. *See* A.R.S. § 13-751(F)(6). The jury also could not decide if the murder was committed in expectation of pecuniary gain. *See* A.R.S. § 13-751(F)(5). That jury did not reach a unanimous verdict in the penalty phase. A second penalty-

phase jury found that the murder was especially depraved and committed for pecuniary gain and that a death sentence was appropriate. We remanded for a new penalty-phase trial because the trial judge erroneously instructed the second penalty-phase jury that the (F)(6) aggravator constituted three separate aggravating circumstances. *Lynch I*, 225 Ariz. at 42–43 ¶¶ 82–89, 234 P.3d at 610–11. Following the new penalty-phase trial, Lynch was again sentenced to death.

II. ISSUES ON APPEAL

A. Prosecutorial Misconduct

¶6 Lynch asserts that the State engaged in prosecutorial misconduct in several ways, individually and in combination. "This Court will reverse a conviction for prosecutorial misconduct only when (1) misconduct is indeed present; and (2) a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying [the] defendant a fair trial." *State v. Martinez*, 218 Ariz. 421, 426 ¶ 15, 189 P.3d 348, 353 (2008) (internal quotation marks omitted). Even when an instance of prosecutorial misconduct does not warrant reversal, "an incident may nonetheless contribute to a finding of persistent and pervasive misconduct if the cumulative effect of the incidents shows that the prosecutor intentionally engaged in improper conduct and did so with indifference, if not a specific intent, to prejudice the defendant." *State v. Roque*, 213 Ariz. 193, 228 ¶ 155, 141 P.3d 368, 403 (2006) (citations and internal quotation marks omitted).

¶7 When a defendant fails to object to an alleged incident of prosecutorial misconduct in the trial court, this Court reviews for fundamental error. *Id.* at 228 ¶ 154, 141 P.3d at 403. To establish fundamental error, Lynch must show that "there was error that went to the foundation of his case and denied him a fair trial, and that he was, in fact, prejudiced by the error." *State v. VanWinkle*, 230 Ariz. 387, 393 ¶ 25, 285 P.3d 308, 314 (2012).

1. Argument during opening statements

¶8 Lynch first asserts the prosecutor improperly presented arguments during his opening statement that "largely focused on persuading the jury that little weight should be given to certain mitigating

factors and expected evidence." The trial court sustained two of Lynch's objections to the State's opening statement – that Lynch's childhood should not be considered a mitigating circumstance because "it happened 30 years ago" and that the defense wanted to "pull at [the jury's] heart strings" in its presentation of mitigating evidence. The court overruled Lynch's objection to the prosecutor's remark that no medical records supported Lynch's assertion that his father intentionally burned his hand as a child. Finally, the State implied that little weight should be given to a defense expert's life-expectancy testimony because the expert relied on a Wikipedia article and Lynch had outlived the expert's prediction for his life expectancy. The trial judge overruled Lynch's objection to these remarks.

¶9 "Opening statement is counsel's opportunity to tell the jury what evidence they intend to introduce. Opening statement is not a time to argue the inferences and conclusions that may be drawn from evidence not yet admitted." *State v. Bible*, 175 Ariz. 549, 602, 858 P.2d 1152, 1205 (1993) (internal citation omitted). "[C]autionary instructions by the court generally cure any possible prejudice from argumentative comments during opening statements," because we presume that jurors follow the court's instructions. *State v. Manuel*, 229 Ariz. 1, 6 ¶ 24, 270 P.3d 828, 833 (2011).

¶10 Here, the court instructed the jury that it should only consider testimony, exhibits, and stipulations as evidence and that attorneys' remarks are not evidence. As to the disallowed statements listed above, the trial judge sustained objections and properly instructed the jury not to consider them as evidence. These instructions cured any prejudice. On balance, although the prosecutor improperly made argumentative statements during opening, we find no reasonable likelihood that the misconduct affected the jury's verdict. *See Martinez*, 218 Ariz. at 426 ¶ 15, 189 P.3d at 353. The State's opening statement did not deny Lynch a fair trial.

2. Improper witness examination

¶11 Lynch argues that the prosecutor committed misconduct during his cross-examination of defense witnesses. The trial court sustained Lynch's objections to two questions that were asked and answered, the State's interruption of defense witnesses on two occasions, the State's comment to a defense expert that she should "just answer my

question for once," and other argumentative questions. The judge overruled Lynch's objections to combative remarks, including, "No, let me ask you the question."

¶12 Although the State's cross-examination was aggressive, and the court would have been well within its discretion to have sustained the objections and required the prosecutor to rephrase his questions in a more civil manner, the questioning did not deny Lynch a fair trial. *See State v. Bolton*, 182 Ariz. 290, 308, 896 P.2d 830, 848 (1995) ("The questioning may have been argumentative. Nevertheless, the misconduct was not so egregious that it permeated the entire trial and probably affected the outcome."). As in *Bolton*, "the prosecutor here did not call defendant pejorative names, refer to matters not in evidence, suggest unfavorable matter for which no proof exists, or abuse defendant in any other way." *Id.* The court instructed the jury to disregard questions to which objections were sustained; to only consider testimony, exhibits, and stipulations as evidence; and that attorneys' remarks are not evidence. We presume that jurors follow instructions. *Manuel*, 229 Ariz. at 6 ¶ 25, 270 P.3d at 833 (presuming that jury followed instructions even though the prosecutor "aggressively cross-examined" the defendant and another witness). We do not find fundamental error in the examination as a whole. As for the remarks to which Lynch's objections were overruled, while the trial court should have exercised more control over the aggressive questioning, the court did not abuse its discretion in overruling the objections.

3. Questions related to veracity of other witnesses

¶13 Lynch argues that the State improperly questioned his expert, Dr. Jolie Brams, a clinical psychologist, on the veracity of other witnesses' statements by accusing her of vouching for witnesses and asking her to comment on the truthfulness of witnesses. "Arizona prohibits lay and expert testimony concerning the veracity of a statement by another witness" because it is the province of the jury to determine veracity and credibility, "and opinions about witness credibility are 'nothing more than advice to jurors on how to decide the case.'" *State v. Boggs*, 218 Ariz. 325, 335, 185 P.3d 111, 121 (2008) (quoting *State v. Moran*, 151 Ariz. 378, 383, 728 P.2d 248, 253 (1986)).

¶14 Brams interviewed several people who knew Lynch and, based in part on those interviews, concluded that Lynch grew up in an

atmosphere of violence and neglect. During cross-examination, the State asked Brams to recount her testimony in another criminal trial in which she had testified that it was highly unlikely that the witness could have remembered previous encounters with a defendant absent some meaningful event and that the witness' recollections were the result of suggestions by law enforcement. The State then asked Brams if testifying about recollected memories is "really just vouching for what somebody is saying" and if she had opined that a witness was not truthful in a third case. Lynch did not object to either question, and Brams answered both questions in the negative. Contrasting her testimony in the previous case to Brams's interview of Lynch's uncle, the prosecutor asked Brams whether a witness was not credible if he said he remembered something that happened forty-nine years earlier even though it did not stand out in his mind, "because you can vouch for people[.]" The trial court sustained Lynch's objection. The State also asked, "[Y]ou are telling us that, for example, [Lynch's sister], in your opinion, was telling the truth about everything?" Lynch failed to object to this question, and Brams replied that she did not think the sister was being purposefully deceitful.

¶15 These questions did not deny Lynch a fair trial. They related to Brams's witness interviews, not the testimony of other witnesses. These interviews were the foundation for Brams's testimony. The prosecutor did not encroach on the jury's evaluation of witness veracity, but rather tested Brams's credibility by attempting to show that she believed interviewees when their story was helpful but was skeptical when their story was not helpful. The State's closing argument addressed Brams's bias and credibility, not her opinion as to the veracity of testimony. The only improper remark was the suggestion that Brams "can vouch for people," and the trial court sustained Lynch's objection and instructed the jury that it was to disregard questions to which objections were sustained. The jury instructions sufficiently cured any prejudice. *See State v. Hardy*, 230 Ariz. 281, 293–94 ¶¶ 61–62, 283 P.3d 12, 24–25 (2012).

4. Speaking objections

¶16 Lynch asserts that the prosecutor improperly made arguments through speaking objections. While making a relevance objection, the State argued that Brams was "obviously vested." After Lynch made a relevance objection to the State's cross-examination of Dr. Gerald Altschuler—a hematologist, oncologist, and internist—the State responded

that Altschuler "is a jack of all trades and not a master of this." While making a relevance objection to what a witness recalled, the State said, "If he wants to just ask him what is in the transcript, I have no objection to that but what he remembers is irrelevant." The State also clarified the basis for a "cumulative" objection after the judge replied, "I'm sorry?" Finally, the prosecutor suggested that the jury be given an interview transcript in lieu of testimony as to what the transcript contained. Lynch did not object to any of these comments at trial. Lynch takes issue with the State twice objecting to his speaking objections, once in the presence of the jury, asserting that the State made speaking objections throughout the trial but did not allow him to do so.

¶17 Arizona law does not explicitly prohibit speaking objections, but "[t]o the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means." Ariz. R. Evid. 103(d). Lynch does not identify—and we have not found—any inadmissible evidence that the State incorporated into its speaking objections. Further, Lynch did not object at trial and fails to demonstrate fundamental error. *See State v. Henderson*, 210 Ariz. 561, 567 ¶ 19, 115 P.3d 601, 607 (2005).

5. Attacks on defense experts

¶18 Lynch contends that the prosecutor committed misconduct by unfairly attacking his expert witnesses. During opening statements, the State told the jury that Altschuler, Lynch's expert regarding his hepatitis C diagnosis, would testify about the Child-Pugh standard for evaluating chronic liver disease. The prosecutor opined that the Child-Pugh standard is a subjective standard that "comes from Wikipedia"[1] and pointed out that Lynch had already outlived the two-year life expectancy Altschuler had given. In response to a defense objection, the trial court commented that the jury had been informed that the opening statement was not evidence, but did not rule on the objection. During Altschuler's cross-examination, the prosecutor asked whether Altschuler examined patients after chemotherapy or if the examination was "done offsite where they actually receive the chemotherapy treatment." Lynch objected on relevance grounds, and the State responded that it was attempting to show

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1 Lynch offered into evidence an article about the Child-Pugh standard that had "Wikipedia" printed at the bottom of the page.

Altschuler's lack of specific expertise—that he "is a jack of all trades and not a master of this." The court overruled the objection.

¶19 As noted above, during the cross-examination of Brams, the prosecutor, referring to Brams's interview of Lynch's uncle, asked Brams whether a witness was not credible if he said he remembered something that happened forty-nine years earlier even though it did not stand out in his mind, "because you can vouch for people[.]" The trial court sustained Lynch's objection. After asking whether Brams had testified in a prior case that a witness was mistaken in his memory of long-past events, the prosecutor then inquired, "Well, this is the same sort of thing here, isn't it? On this particular case you took a look at what somebody said and you reached a conclusion that perhaps they were mistaken or whatever term you want to use, right?" Brams explained that her testimony in the prior case was that a suggestive police interview might have influenced the interviewee's statements. Finally, the prosecutor asked Brams about her refusal to produce two documents he requested. Brams explained that she did not realize she had the documents. The prosecutor replied, "And so what you're saying is had you known that those two pages were in your binder, you would have removed them before the interview?" Brams began to deny the accusation, but the prosecutor interrupted. The judge sustained Lynch's objection to the interruption, and Brams explained that she would have disclosed the pages had she known she had them.

¶20 The prosecutor also asked Brams whether being an expert on recollected memories is "really just vouching for what somebody is saying," but Lynch did not object. Lynch also failed to object to the prosecutor's remark during closing argument that Brams "was able to tell the Court under oath that [a] witness was wrong, without ever speaking to that witness" and that she followed improper procedures such as taking written notes that "no one can interpret." The prosecutor also accused Brams of refusing to disclose her notes and slanting the truth. Again, Lynch did not object. Lynch also takes issue with the State's comments during closing argument such as, "That's the person they chose," because, in Lynch's view, the comments were calculated to tie Brams's supposed disclosure violations and improper practices to defense counsel. Lynch failed to object at trial.

¶21 A prosecutor may "inquire into the credentials and employment of an expert witness to show bias or motive," but cannot

"insinuate that an expert is unethical or incompetent without properly admitted evidence to support it." *State v. Bailey*, 132 Ariz. 472, 478–79, 647 P.2d 170, 176–77 (1982).

¶22 Here, although the prosecutor was aggressive, there was no reversible error. *See id.* The trial court sustained Lynch's objections to many of the questions, and the court's instructions to disregard the statements cured any possible prejudice. *See Manuel*, 229 Ariz. at 6 ¶ 24, 270 P.3d at 833. The court did not abuse its discretion in overruling any of the objections. As to the remarks to which Lynch did not object, he fails to show prejudice. Accordingly, the State's remarks during closing argument did not amount to fundamental error. *State v. Morris*, 215 Ariz. 324, 337 ¶ 59, 160 P.3d 203, 216 (2007).

6. Appeal to the fears of the jury

¶23 Lynch next contends that the prosecutor improperly appealed to the jurors' fears during his cross-examination of defense expert James Aiken. While inquiring about the security designation that Lynch would receive in prison, the prosecutor asked about an unrelated incident in Arizona where convicted murderers escaped from prison. Lynch did not object to this question. The prosecutor also asked Aiken whether it was possible that Lynch "could stick or prick, with a sharp object, one of the corrections officers." When Aiken answered that the probability was miniscule, the prosecutor asked whether "that would be comfort to the person who got stuck by a needle that Shawn Lynch had used." The trial judge overruled Lynch's relevance objection. Lynch argues on appeal that the State did not offer any reason to believe that the escaped prisoners were in a similar position as him and that there was no evidence to support the State's assertion that he would attack an officer.

¶24 Although the cross-examination was argumentative, and the trial judge could have sustained an objection on that basis, it was relevant. The defense elicited from Aiken testimony that Lynch could be safely housed in prison. The cross-examination was relevant rebuttal to that testimony. *See* Ariz. R. Evid. 401(a) ("Evidence is relevant if [] it has any tendency to make a fact more or less probable than it would be without the evidence "); Ariz. R. Evid. 611(b) ("A witness may be cross-examined on any relevant matter."). That other offenders escaped from prison makes it less likely that Lynch could be housed safely. Additionally, that Lynch's

hepatitis C could be transmitted through needles makes him more of a threat in prison than one without such a disease.

7. Misstating the evidence

¶25 During the cross-examination of Brams, the State asked whether she had previously said it was a waste of time to go over her notes and, after Brams said she did not recall, played a recording in which she said it would be a waste of time to go through every word of her notes. The trial court sustained Lynch's objection to the admission of the recording on the ground that Brams's statement was taken out of context. The prosecutor also asked Brams, "[D]idn't you tell us about a case involving a guy named Braulio Martinez yesterday where you said that he was mistaken because you can read minds?" The trial judge sustained Lynch's objection. Finally, the court sustained Lynch's objection to a statement in the State's closing argument that renting pornographic movies demonstrated Lynch's poor character.

¶26 Intentionally misstating evidence constitutes misconduct. *See State v. Cannon*, 148 Ariz. 72, 77, 713 P.2d 273, 278 (1985). When defense counsel can correct the misstatement at trial, however, we are hesitant to find reversible error. *Id.* Although the prosecutor made inappropriate remarks, defense counsel's objections were sustained and the prosecutor did not argue those points further. The trial judge instructed the jury at the beginning and end of the proceedings not to consider matters to which the court sustained objections. We presume juries follow instructions, *Manuel*, 229 Ariz. at 6 ¶ 25, 270 P.3d at 833, and there is no evidence that the jury failed to heed this instruction. Lynch has not shown that the prosecutor's remarks could have affected the jury's verdict. *See Martinez*, 218 Ariz. at 426 ¶ 15, 189 P.3d at 353.

8. Ad hominem attacks on defense counsel

¶27 Lynch argues that the prosecutor committed misconduct by repeatedly resorting to ad hominem attacks against defense counsel. During opening statement and closing arguments, the prosecutor repeatedly characterized Lynch's mitigation evidence as "a myth" and "fanciful" and made other similar comments. The prosecutor also attacked the defense theory that Lynch was not the killer by stating that the DNA evidence "is something that you perhaps will not consider when you are

asked to speculate, as they put it[,] or try to determine who was the person who did the cutting." Lynch did not object to any of these statements.

¶28 We have consistently held that prosecutors have wide latitude in closing arguments and may argue all reasonable inferences from the evidence. *State v. Hill*, 174 Ariz. 313, 322, 848 P.2d 1375, 1384 (1993). But it is always improper for the prosecutor to "impugn the integrity or honesty of opposing counsel." *State v. Newell*, 212 Ariz. 389, 403 ¶ 66, 132 P.3d 833, 847 (2006) (holding it was improper to imply that defense counsel was arguing for a position he knew to be false). Nonetheless, such comments warrant reversal only if a defendant can show a reasonable likelihood that the misconduct could have tainted the jury's verdict. *Id.* Moreover, "[c]riticism of defense theories and tactics is a proper subject of closing argument." *State v. Ramos*, 235 Ariz. 230, 238 ¶ 25, 330 P.3d 987, 995 (App. 2014) (quoting *United States v. Sayetsitty*, 107 F.3d 1405, 1409 (9th Cir. 1997)). In *Ramos*, the court ruled that the prosecutor's accusation that the defense raised "red herrings" and asked the jury to "check [their] common sense at the door" was proper criticism of defense tactics even though it suggested that defense counsel attempted to mislead the jury. *Id.* at 237–38 ¶¶ 24–25, 330 P.3d at 994–95.

¶29 Here, although the prosecutor repeatedly suggested that Lynch's defense was not credible, his criticism was directed at defense *theories* rather than defense *counsel*. *Compare State v. Amaya-Ruiz*, 166 Ariz. 152, 171, 800 P.2d 1260, 1279 (1990) (no misconduct where prosecutor called defense theories "outrageous," a "smoke screen," and supported only by "innuendo and inference"), *with State v. Hughes*, 193 Ariz. 72, 86 ¶ 61, 969 P.2d 1184, 1198 (1998) (misconduct to argue that defense counsel and experts "fabricated" insanity defense without evidentiary support). The prosecutor's remarks were not improper. Moreover, the trial judge instructed the jury that the lawyers' arguments are not evidence. The prosecutor's comments did not deprive Lynch of a fair trial. *See Newell*, 212 Ariz. at 403 ¶ 67, 132 P.3d at 847

9. Vouching and relying on evidence outside of the record

¶30 During closing argument, the prosecutor commented that "this defendant—and he did—slash [Panzarella's] throat." Lynch contends this was improper because the prosecutor had previously objected to the introduction of the guilty verdict, which indicated that only eight of the

guilt-phase jurors found that Lynch had killed a person,[2] and the trial court precluded it. Lynch argues the State improperly argued that Lynch was the actual killer and interfered with his ability to dispute this point by objecting to the introduction of the guilty verdict. Lynch also contends that the prosecutor vouched for the police officers involved by saying, "the Scottsdale Police Department did its darndest" and "[t]hey tried," referring to the department's attempt to find Panzarella's DNA on Sehwani's shirt. The prosecutor also referred to blood-spatter evidence as "the law" and said "the State does not agree that [Lynch's mitigating circumstances] are mitigating circumstances." Lynch did not object to any of these comments at trial.

¶31 A prosecutor improperly vouches by either placing the prestige of the government behind its evidence or suggesting that facts not before the jury support the state's evidence. *Newell*, 212 Ariz. at 402 ¶ 62, 132 P.3d at 846; *State v. Vincent*, 159 Ariz. 418, 423, 768 P.2d 150, 155 (1989). Even if vouching occurs, the trial court may "cure the error by instructing the jury not to consider the attorneys' arguments as evidence." *State v. Payne*, 233 Ariz. 484, 512 ¶ 109, 314 P.3d 1239, 1267 (2013).

¶32 Although the prosecutor said the crime lab tried its "darndest" and referred to blood-spatter analysis as "the law," it was proper for the State to suggest that, because police did not find Panzarella's blood on Sehwani, the jury should infer that Lynch actually committed the murder. Contrary to Lynch's assertion, the fact that four jurors on the guilt-phase jury were not convinced that Lynch was the killer does not make the prosecutor's comments misconduct. *See Bible*, 175 Ariz. at 602, 858 P.2d at 1205 ("[D]uring closing arguments counsel may summarize the evidence, make submittals to the jury, urge the jury to draw reasonable inferences from the evidence, and suggest ultimate conclusions."). Finally, Lynch did not object to the prosecutor's reference to blood-spatter evidence as the law or the prosecutor's comment that "the State does not agree," and he fails to show that these remarks denied him a fair trial. Although the prosecutor put the prestige of the government behind his evidence by saying that "the State does not agree," the trial court cured the error by instructing the jury

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[2] The jury was unanimous only in finding that Lynch was a major participant in the felony and had acted with reckless indifference for human life.

not to consider the attorneys' arguments as evidence. The prosecutor's comments did not constitute sufficient misconduct to warrant reversal.

10. Misstatement of the law

¶33 Lynch contends the prosecutor committed misconduct by misstating the law. A prosecutor should not misstate the law during closing argument. *State v. Serna*, 163 Ariz. 260, 266, 787 P.2d 1056, 1062 (1990). Trial courts are given broad discretion in controlling closing argument, and their rulings will only be overturned for an abuse of discretion. *State v. Tims*, 143 Ariz. 196, 199, 693 P.3d 333, 336 (1985).

a. A.R.S. § 13-751(G)(1)

¶34 Substantial impairment of a person's capacity to appreciate the wrongfulness of his conduct is a statutorily identified mitigating circumstance. A.R.S. § 13-751(G). The prosecutor argued that a person can only fail to appreciate the wrongfulness of conduct if the person admits the conduct. The trial court overruled Lynch's objection. The prosecutor also questioned why Lynch would leave the crime scene and take the knife if he did not think his conduct was wrong. Lynch argues that this was a misstatement of the law because the mental impairment mitigating factor "is a sliding consideration," and the prosecutor argued that it "was a yes or no proposition."

¶35 Under § 13-751(G)(1), jurors must consider a "defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law." The State's remark was not a misstatement of law, but rather an attempt to point out an inconsistency in Lynch's story. The prosecutor was entitled to argue that Lynch committed the murder and appreciated the wrongfulness of his conduct.

b. History of substance abuse

¶36 Lynch contends that the prosecutor misstated the law by arguing that Lynch's substance abuse was not a mitigating factor, but rather something that made the crime worse. Lynch did not object at trial. Substance abuse can be a mitigating factor in capital cases. *State v. Kayer*, 194 Ariz. 423, 438 ¶ 52, 984 P.2d 31, 46 (1999). But a prosecutor does not commit misconduct by arguing that a mitigating factor does not warrant

leniency or that jurors should give it little consideration. *State v. Anderson*, 210 Ariz. 327, 350 ¶ 97, 111 P.3d 369, 392 (2005), *supplemented* 211 Ariz. 59, 116 P.3d 1219 (2005); *see also State v. Prince*, 226 Ariz. 516, 538 ¶ 90, 250 P.3d 1145, 1167 (2011) (no fundamental error where prosecutor argued that defendant's bad temper was not sufficiently substantial to warrant leniency but rather "should be aggravation" where State was precluded from retrying aggravators). The prosecutor did not commit misconduct by suggesting that Lynch's drug use did not warrant leniency.

c. Pornographic videos

¶37 Lynch claims the prosecutor misstated the law by arguing that Lynch's renting pornographic videos "shows a debasement in the part of [Lynch's] character. And that has already been found, because this murder has been found to be especially heinous and depraved." The trial court correctly sustained Lynch's objection to this argument, properly instructed the jury on the issue, and instructed the jury to disregard remarks to which the court sustained objections. Lynch has not overcome the presumption that the jury followed these instructions. *See Manuel*, 229 Ariz. at 6 ¶ 25, 270 P.3d at 833.

d. Dysfunctional childhood

¶38 Lynch contends that the prosecutor misstated the law by arguing that Lynch's difficult childhood was "so remote" that it was "an excuse, not a mitigating factor." Lynch was thirty-nine years old at the time of the murder. We have held that "[a] difficult or traumatic childhood is a mitigating circumstance." *Prince*, 226 Ariz. at 541 ¶ 109, 250 P.3d at 1170. Although a defendant does not have to demonstrate a connection between the mitigating circumstances and the crime, the remoteness or lack of a connection between the mitigating factor and the crime may make the mitigating factor less persuasive. *Id.* Thus, a jury may give less consideration to a difficult childhood when a defendant is older. *See id.* (noting on independent review that "[d]ifficult childhood circumstances also receive less weight as more time passes between the defendant's childhood and the offense").

¶39 These remarks were not improper. *See State v. Villalobos*, 225 Ariz. 74, 83 ¶¶ 37–39, 235 P.3d 227, 236 (2010) (reasoning that prosecutor's remark that "there is absolutely nothing mitigating about who he is in light

of what you've seen him do" was not improper); *Anderson*, 210 Ariz. at 350 ¶ 97, 111 P.3d at 392 ("Once the jury has heard all of the defendant's mitigation evidence, there is no constitutional prohibition against the State arguing that the evidence is not particularly relevant or that it is entitled to little weight."). Additionally, the court properly instructed the jury on this mitigating factor, and Lynch has not shown that the jury disregarded the instruction.

e. Life as a "free bite of the apple"

¶40 Lynch argues that the prosecutor misstated the law by arguing that the jury should disregard Lynch's prison sentences. As mitigation, Lynch pointed out that he would never leave prison alive because of his consecutive prison terms. The prosecutor contended that this argument gave Lynch a "free bite of the apple." The prosecutor was not stating the law; rather, he was arguing that the jury should not spare Lynch's life merely because he committed other crimes for which he would have to serve considerable prison time. Moreover, the court properly instructed the jury on this issue.

f. (F)(6) aggravator

¶41 Lynch contends that the prosecutor misstated the law by characterizing the (F)(6) aggravator as involving separate aggravating factors. During voir dire, the prosecutor told prospective jurors:

> [T]his crime and this is one aggravating factor, was committed in an especially cruel, especially heinous or especially depraved fashion but the prior jury has already found that he was guilty not only of it—even though it's one factor, especially depraved, that's what they found, it was especially heinous.

Lynch objected that the prosecutor was addressing single prongs of the aggravator. The trial court denied Lynch's motion to strike the statement, but told the prosecutor to be clear that it was only one aggravator. The prosecutor then told prospective jurors that the murder "was found to be especially heinous, especially cruel and especially depraved." The trial judge sustained Lynch's objection to the use of the word "and."

¶42 In his closing argument, the prosecutor described both especial cruelty and especial heinousness and indicated that each had already been established in this case. He then told the jury, "[C]ompare those three aspects, the murder and the aggravating circumstances, but there is also this indication that [it] was for pecuniary gain." Lynch did not object in the trial court, but now asserts that the prosecutor sought to indicate three aggravators existed when there were only two. Lynch argues this was not accidental, citing the prosecutor's comment that he wished to call witnesses "to show the four factors [he] proved previously," his request to include the definitions of especially cruel, especially heinous, and especially depraved in the preliminary jury instructions, and his proposed jury instruction indicating that "Lynch committed the murder in an especially heinous, cruel *and* depraved manner."

¶43 The (F)(6) aggravator is "a single aggravating circumstance that can be established in alternative ways." *Lynch I*, 225 Ariz. at 42 ¶ 84, 234 P.3d at 610. The prosecutor struggled at times during voir dire and closing argument with the disjunctive "or" and conjunctive "and" in explaining the (F)(6) aggravator, but Lynch objected to the misstatements and the trial court had the prosecutor clarify that the (F)(6) aggravator is only one aggravator. The trial court also properly instructed the jury on the (F)(6) aggravator. Lynch has not identified any reversible error.

11. Comment on Lynch not testifying

¶44 The prosecutor, referring to the encounter between Lynch and Panzarella immediately before the murder, asked the jury in closing argument, "What's going on?" and then asked, "Were words exchanged? Who knows." Lynch did not object, but now asserts that these comments were improper because the only people who could have answered those questions were the victim and Lynch.

¶45 A prosecutor may not comment on a defendant's decision not to testify, either directly or indirectly. *State v. Rutledge*, 205 Ariz. 7, 12 ¶ 26, 66 P.3d 50, 55 (2003). A prosecutor's statement is a comment on a defendant's "protected silence" if a jury would "naturally and necessarily" perceive it as a comment on a defendant's failure to testify. *Payne*, 233 Ariz. at 514 ¶ 126, 314 P.3d at 1269 (internal quotation marks omitted).

¶46 Here, the prosecutor's statements were proper. They did not call attention to the fact that Lynch did not testify, but rather pointed out that the events leading up to the murder were unclear. The jury would not have "naturally and necessarily" perceived the remarks as a comment on Lynch's failure to testify.

12. Personalization

¶47 Lynch asserts that the prosecutor improperly encouraged the jurors to put themselves in the victim's position. During his opening statement, the prosecutor said:

> So what happens is the defendant then, as Mr. Panzarella sits there, goes behind him and begins and cuts his throat from ear to ear. The problem of the unfortunate aspect of that, because in and of itself, cutting somebody's throat is a horrific, ghastly thing, you can only imagine. I don't think you can even imagine what it's like for somebody to approach you with a knife. You cannot move and you know they're manhandling you and they are going to cut your throat.

The trial court sustained Lynch's objection and granted his motion to strike. The prosecutor also quoted a line from a poem indicating that every person's death diminishes society as a whole, "so therefore send no one to find for whom the bell tolls, it tolls for thee." The prosecutor concluded his argument by stating that "[the bell] tolls for each and every one of you, in light of the evidence in this case, to return a verdict of death on Shawn Patrick Lynch."

¶48 A prosecutor has wide latitude in closing argument, but may not make arguments that appeal to the jury's fear or passion. *Morris*, 215 Ariz. at 337 ¶ 58, 160 P.3d at 216. This includes inviting jurors to place themselves in the victim's position because doing so plays on the jurors' fear of the defendant or sympathy for the victim. *See id.* The proper response to an improper prosecutorial comment is an objection, motion to strike, and a jury instruction to disregard the stricken comment. *See Newell*, 212 Ariz. at 403 ¶ 69, 132 P.3d at 847.

¶49 The prosecutor's first comment was improper. By telling the jurors that they could not know what it was like to be "manhandled" by the knife-wielding defendant, the prosecutor invited the jurors to place themselves in the victim's position and appealed to their fears. But the trial court properly sustained Lynch's objection, struck the argument, and told the jury to disregard it. Given the presumption that jurors follow instructions, we conclude that this comment did not affect the jury verdict. *See id.*

¶50 Because Lynch did not object to the prosecutor's referencing the poem at trial, we review for fundamental error. *See Morris*, 215 Ariz. at 337 ¶ 59, 160 P.3d at 216. Lynch cannot show that the references deprived him of a fair trial. The prosecutor did not appeal to the jury's fear of Lynch or sympathy for the victim or ask the jurors to place themselves in the victim's shoes during the murder. Rather, the prosecutor commented that murder affects society as a whole.

13. Cumulative misconduct

¶51 Lynch argues that even if none of the individual instances of prosecutorial misconduct warrants reversal, the cumulative effect requires reversal, particularly given the prosecutor's experience and track record of misconduct. "We consider whether persistent and pervasive misconduct occurred and whether the cumulative effect of the incidents shows that the prosecutor intentionally engaged in improper conduct and did so with indifference, if not a specific intent, to prejudice the defendant." *State v. Gallardo*, 225 Ariz. 560, 570, 242 P.3d 159, 169 (2010) (quoting *Morris*, 215 Ariz. at 339 ¶ 67, 160 P.3d at 218) (internal quotation marks omitted).

¶52 During this retrial of the penalty phase, the prosecutor disturbingly made a number of inappropriate comments, prompting valid objections by Lynch that the trial court sustained. Although the prosecutor made some improper remarks, they did not amount to persistent and pervasive misconduct that deprived Lynch of a fair trial. The trial judge sustained objections to all of the improper comments except, "No, let me ask you the question." The court instructed the jury to disregard questions to which objections were sustained, to only consider testimony, exhibits, and stipulations as evidence, and that attorneys' remarks are not evidence. We presume that jurors follow instructions, *Manuel*, 229 Ariz. at 6 ¶ 25, 270 P.3d at 833, and any cumulative prejudice resulting from the prosecutor's

remarks is insufficient to overcome this presumption. *See Gallardo*, 225 Ariz. at 569 ¶ 40, 242 P.3d at 168 (reasoning that similar instructions cured any prejudice). Given these instructions, and that the "let me ask you the question" remark was the only improper comment to which the court overruled Lynch's objection, the prosecutor's conduct did not deny Lynch a fair trial. As to the statements to which Lynch did not object, we have concluded that Lynch failed to prove fundamental error. We consider these statements as well in our conclusion that prosecutorial misconduct, while present in some instances, was not so pronounced or sustained as to require a new sentencing trial.

B. Limiting Retrial to Penalty Phase and Preclusion of Guilty Verdict

¶53 Lynch claims that the trial court erred when it denied his motion to retry the aggravation phase and prohibited him from offering the guilty verdict as an exhibit during the penalty-phase retrial. He contends that these errors deprived him of an individualized sentencing because they denied the jury an adequate opportunity to evaluate the evidence supporting the aggravating circumstances and established a presumption of death. We review the interpretation of statutes and constitutional provisions de novo, *State v. Hansen*, 215 Ariz. 287, 289 ¶ 6, 160 P.3d 166, 168 (2007), and evidentiary rulings for an abuse of discretion. *State v. Benson*, 232 Ariz. 452, 466 ¶ 58, 307 P.3d 19, 33 (2013).

¶54 Following Lynch's second penalty-phase trial, we reversed Lynch's death sentence and remanded for a new penalty-phase proceeding. *Lynch I*, 225 Ariz. at 43 ¶ 89, 234 P.3d at 611. We ordered the trial court to instruct the jury "that the (F)(5) and (F)(6) aggravators have been previously found and that it is not to retry those issues." *Id.* (citing A.R.S. § 13-752(K)). Relying on this language, the trial court on remand denied Lynch's request for an aggravation-phase retrial.

¶55 Section 13-752(K) provides:

> At the penalty phase, if the trier of fact is a jury and the jury is unable to reach a verdict, the court shall dismiss the jury and shall impanel a new jury. The new jury shall not retry the issue of the defendant's guilt or the issue regarding any of the aggravating circumstances that the first jury found by unanimous verdict to be proved or not proved. If the new jury is unable to reach a unanimous verdict, the court shall impose a sentence of life or natural life on the defendant.

A.R.S. § 13-752(K). Lynch contends that § 13-752(K) only applies when a jury is unable to decide upon a penalty, and § 13-752(N) applies when a death sentence has been vacated. Under § 13-752(N), "[i]f the sentence of a person who was sentenced to death is overturned, the person shall be resentenced pursuant to this section by a jury that is specifically impaneled for this purpose as if the original sentencing had not occurred." Lynch argues that because the aggravation phase is part of the sentencing proceeding, A.R.S. § 13-752(C), both the aggravation and penalty phases should have been retried. The State responds that the error this Court previously found in *Lynch I* was only in the penalty phase, not the entire sentencing proceeding, and reading the statute as a whole, this Court properly remanded for a trial of only the penalty phase.

¶56 There are two provisions of § 13-752 that inform our analysis. As noted above, § 13-752(N) provides that, "[i]f the sentence of a person who was sentenced to death is overturned, the person shall be resentenced pursuant to this section as if the original sentencing had not occurred." Based on this language, Lynch argues he was entitled to an entirely new sentencing proceeding. *See* A.R.S. § 13-752(C), (D) (indicating that a "sentencing proceeding" consists of both the aggravation and penalty phases). But under § 13-752(O), a defendant whose sentence is overturned must simply be "resentenced by a jury that is specifically impaneled" for that purpose. *See* A.R.S. § 13-752(D) ("If the trier of fact finds that one or more of the alleged aggravating circumstances have been proven, the trier of fact shall then immediately determine whether the death penalty should be imposed. This proceeding is the penalty phase of the sentencing proceeding."). Thus, the statute's text leaves it unclear when a defendant is entitled to an entirely new sentencing proceeding, and when a defendant

is entitled to only a new penalty-phase proceeding. We conclude, as we did in *Lynch I*, that Lynch was entitled only to a new penalty-phase proceeding.

¶57 The history of § 13-752 suggests that subsection (N) applies only to a particular subset of sentences overturned on appeal. The United States Supreme Court decided in *Ring v. Arizona* (*Ring II*), 536 U.S. 584 (2002), that Arizona's capital-sentencing scheme violated the Sixth Amendment because judges, rather than juries, found aggravating factors that made defendants death eligible. *Id.* at 609. This opinion left a large number of capital cases in flux, particularly those cases where defendants had not exhausted their appeals. *See State v. Ring* (*Ring III*), 204 Ariz. 534, 544 ¶ 5, 65 P.3d 915, 925 (2003) ("At the time of the *Ring II* decision, thirty-one defendants sentenced to death had matters pending on direct appeal before this court."). In response, the legislature passed an emergency measure, S.B. 1001, to bring Arizona's death penalty statutes into compliance with *Ring II*. *Id.* at 545 ¶ 13, 65 P.3d at 926. By using the language "a person who *was* sentenced to death," the legislature intended for subsection (N) to be a limited solution for *Ring II*-defective sentences. A defendant who "was sentenced" to death after a judge found aggravating circumstances was entitled to an entirely new sentencing proceeding, unless this Court found the *Ring* error to be harmless beyond a reasonable doubt, because an error of constitutional significance tainted the *aggravation* phase of every such case. Thus, the legislature instructed the courts to act as if the original sentencing simply "had not occurred" and to start the sentencing process over again. A.R.S. § 13-752(N).

¶58 Subsection (O), on the other hand, is more general and pertains to sentences overturned for any reason. This subsection does not instruct the courts that they must act as if the original sentencing had not occurred, but rather directs them to simply sentence or resentence a defendant as appropriate to remedy a sentencing error. A.R.S. § 13-752(O). This Court "may reverse, affirm or modify the judgment appealed from, and may grant a new trial or render any judgment or make any order which is consistent with the justice and the rights of the state and the defendant." A.R.S. § 13-4036. Arizona's sentencing statute seeks to avoid retrials of proceedings untainted by error. A.R.S. § 13-752(J) (providing that, where a jury cannot reach a verdict on aggravating circumstances, "[t]he new jury shall not retry the issue of the defendant's guilt"); A.R.S. § 13-752(K) (providing that, where a jury cannot reach a verdict in the penalty phase, "[t]he new jury shall not retry the issue of the defendant's guilt or the issue

regarding any of the aggravating circumstances that the first jury found by unanimous verdict to be proved or not proved"). Requiring a retrial of the entire sentencing proceeding when the error occurred only during the penalty phase would undermine the statute's purpose.

¶59 We limited the retrial to the penalty phase because Lynch's original sentence was not reversed for a *Ring II*-defective sentence or any other error in the aggravation phase. Rather, the error arose from an improper penalty-phase instruction. *Lynch I*, 225 Ariz. at 42–43 ¶ 88, 234 P.3d at 610–11. Limiting the retrial to the penalty phase was consistent with justice and the rights of the parties.

¶60 Likewise, limiting the retrial to the penalty phase did not deprive Lynch of an individualized sentencing. "[D]uring a second penalty phase, the state and the defendant may introduce evidence pertaining to the aggravating circumstances previously found" because aggravation-phase evidence is "directly relevant to whether the mitigation is 'sufficiently substantial to call for leniency.'" *Prince*, 226 Ariz. at 526 ¶¶ 16, 18, 250 P.3d at 1155 (quoting A.R.S. § 13-752(G)). This affords jurors sufficient opportunity to evaluate the aggravating circumstances when determining whether death is the appropriate penalty. During Lynch's penalty-phase retrial, the jury heard abundant testimony concerning the circumstances of the offense and the aggravating factors, and Lynch was free to offer additional evidence from the guilt and aggravation phases. He was not entitled, however, to retry the aggravation phase when no error occurred in that proceeding.

¶61 Precluding the guilty verdict from evidence likewise did not deprive Lynch of an individualized sentencing. Lynch contends the fact that most of the jurors found him guilty only of felony murder, not premeditated murder, was relevant as a mitigating circumstance. The trial court did not abuse its discretion in ruling that the verdict form was "not related to any aspect of the defendant's character, propensities or record, or circumstances of the offense." Neither the guilty-verdict form nor the jurors' votes provided evidence of the circumstances of the murder.

C. Refusal to Give *Simmons* Instruction

¶62 Lynch next contends the trial court erred in refusing to instruct the jury that he would never be released if sentenced to prison. He

attempted to waive his right to be considered for a release-eligible sentence and requested that the jury be instructed regarding his ineligibility for release. The trial court ruled that Lynch could not "unilaterally choose which sentence should be imposed" and denied his motion.

¶63 We review jury instructions and alleged constitutional violations de novo. *State v. Nelson*, 229 Ariz. 180, 185 ¶ 21, 273 P.3d 632, 637 (2012); *State v. McGill*, 213 Ariz. 147, 157–58 ¶ 45, 140 P.3d 930, 940–41 (2006). But we review a court's refusal to inform the jury of the defendant's willingness to waive parole eligibility for an abuse of discretion. *Benson*, 232 Ariz. at 465 ¶ 52, 307 P.3d at 32.

¶64 The United States Supreme Court has held that "where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible." *Simmons v. South Carolina*, 512 U.S. 154, 156 (1994) (plurality opinion). The State suggested at trial that Lynch could be dangerous. Further, parole is available only to individuals who committed a felony before January 1, 1994, and juveniles. A.R.S. § 41-1604.09(I).

¶65 Parole eligibility is not a right that can be waived. *Benson*, 232 Ariz. at 465 ¶ 54, 307 P.3d at 32. To the contrary, the eligibility decision is within the trial court's discretion. *Id.*; *see also State v. Dann*, 220 Ariz. 351, 373 ¶ 124, 207 P.3d 604, 626 (2009) (holding that defendants may not "presentence" themselves). The sentencing statute in effect at the time of the murder authorized the imposition of release-eligible sentences. A.R.S. § 13-703(A) (renumbered as A.R.S. § 13-751(A)). The trial judge thus properly instructed the jury that she could impose a release-eligible sentence if the jury did not return a death verdict. "*Simmons* applies only to instances where, as a legal matter, there is *no possibility* of parole if the jury decides the appropriate sentence is life in prison." *Ramdass v. Angelone*, 530 U.S. 156, 169 (2000) (emphasis added). Because § 13-703(A) permitted the possibility of Lynch obtaining release, refusing a *Simmons* instruction was not error. *See Benson*, 232 Ariz. at 465 ¶ 56, 307 P.3d at 32. An instruction that parole is not currently available would be correct, but the failure to give the *Simmons* instruction was not error.

¶66 Further, the alternative instruction Lynch offered was inaccurate. Instead of merely instructing on the unavailability of parole, it

would have informed the jury, "If your verdict is that Mr. Lynch should be sentenced to life the court will sentence him to natural life which means Mr. Lynch would never be released from prison for his entire life." As discussed, the court could have imposed a release-eligible sentence. Even if parole remained unavailable, Lynch could have received another form of release, such as executive clemency. We have previously rejected a similarly overbroad instruction. *State v. Boyston*, 231 Ariz. 539, 552–53 ¶ 67–68, 298 P.3d 887, 900–01 (2013) (rejecting instruction that defendant would "never be eligible to be released from prison for any reason for the rest of his life" because it "referred more broadly to any form of release or commutation of sentence").

D. *Batson* Challenge

¶67 Lynch next argues the trial court violated *Batson v. Kentucky*, 476 U.S. 79 (1986), when it permitted the State to strike five Hispanic jurors over his objection. "A denial of a *Batson* challenge will not be reversed unless clearly erroneous." *Newell*, 212 Ariz. at 400 ¶ 52, 132 P.3d at 844. We defer to the trial court's ruling regarding the State's motives for a peremptory strike, *State v. Garcia*, 224 Ariz. 1, 10 ¶ 22, 226 P.3d 370, 379 (2010), and review the trial court's application of the law de novo. *Newell*, 212 Ariz. at 401 ¶ 52, 132 P.3d at 845.

¶68 The State used five of its ten peremptory strikes on prospective jurors 8, 32, 34, 49, and 255, all of whom identified themselves as Hispanic. The prosecutor explained that Number 255 "indicated that she is philosophically opposed to the death penalty" and could not explain "why she believed that life was preferable to death." Number 49 had previously served on two hung juries, and the State argued she would cause the Lynch jury to hang, which would prevent the State from retrying the case. Number 34 had tattoos on his legs and arm, and one of Lynch's mitigating circumstances was that he had hepatitis C—which he contracted when he received a tattoo—and the State did not want a juror on the panel who could identify with Lynch. The prosecutor claimed that Number 32 had "facial hair resembl[ing] ZZ Top" and a long ponytail "like Jerry Garcia," which motivated striking that juror. The State noted that it also struck a white juror with long hair and facial hair. Number 8 "had a brother who was convicted of child abuse, and she was pretty unhappy." The State referred to Lynch's allegation that he had been abused. The trial court found that the State's reasons for striking the prospective jurors were race

neutral. Lynch responded that the State's reasons for striking Numbers 32 (long hair and facial hair) and 34 (tattoos) did not justify the strikes.

¶69 "[T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race " *Batson*, 476 U.S. at 89. *Batson* challenges are subject to the following three-step analysis:

> (1) the party challenging the strike must make a prima facie showing of discrimination; (2) the striking party must provide a race-neutral reason for the strike; and (3) if a race-neutral explanation is provided, the trial court must determine whether the challenger has carried its burden of proving purposeful racial discrimination.

Garcia, 224 Ariz. at 10, 226 P.3d at 379 (quoting *State v. Canez*, 202 Ariz. 133, 146 ¶ 22, 42 P.3d 564, 577 (2002)). "[T]he ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *Id.* (quoting *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (per curiam)). A peremptory strike does not violate *Batson* where the prosecutor's explanation is facially race neutral and the defendant "offer[s] no evidence, other than inference, to show that the peremptory strike was a result of purposeful racial discrimination." *Newell*, 212 Ariz. at 402 ¶ 58, 132 P.3d at 846.

¶70 The trial court found that the State's proffered reasons for the strikes were race neutral, implicitly ruling that Lynch did not carry his burden of proving purposeful racial discrimination. The fact that the State did not ask voir dire questions related to Juror 32's long hair and facial hair or Juror 34's tattoos does not establish that the strikes were pretextual. *See Canez*, 202 Ariz. at 145 ¶ 18, 42 P.3d at 576 (affirming trial court's denial of *Batson* challenge even though the defendant argued the State's justification was pretextual because it did not ask follow-up questions). The court did not err.

E. Denial of Motion to Strike Juror 5

¶71 Lynch contends the trial court erred in refusing to strike Juror 5, who had previously worked at the same hospital as one of the State's witnesses, Dr. Vincent Honan. Lynch bore "the burden of establishing that the juror [wa]s incapable of rendering a fair and impartial verdict." *State v.*

Lavers, 168 Ariz. 376, 390, 814 P.2d 333, 347 (1991). This Court does not set aside a trial court's refusal to strike a juror "absent a clear showing that the court abused its discretion." *Id.*

¶72 The State called Honan, a gastroenterologist who worked at Banner Good Samaritan Hospital, to testify about hepatitis C, the liver, and Lynch's life expectancy. Juror 5 sent the trial judge a letter explaining that she previously worked in the medical surgical ICU at Banner Good Samaritan and recognized Honan. Juror 5 "had no direct dealings with Dr. Honan," but thought "the surgeons that work at Good Sam are excellent surgeons." She indicated that she could still be fair in Lynch's case. After reviewing Juror 5's questionnaire and considering her responses in open court, the trial judge denied Lynch's motion to strike Juror 5.

¶73 A court is obligated to excuse a juror who cannot render a fair and impartial verdict. Ariz. R. Crim. P 18.4(b); *see also* A.R.S. § 21-211. We examine three factors when determining if a juror may continue to serve after that juror's objectivity is challenged: (1) the nature of the relationship between the witness and the juror; (2) whether the juror will properly assess the testimony; and (3) the importance of the testimony and whether the testimony was disputed. *Bible*, 175 Ariz. at 574, 858 P.2d at 1177

¶74 The relationship between Juror 5 and the witness was not sufficient to warrant dismissal. Although knowledge of or professional acquaintance with a witness calls a juror's objectivity into question, it does not require automatic disqualification. *See Hill*, 174 Ariz. at 319–20, 848 P.2d at 1381–82 (finding no abuse of discretion in not dismissing juror who was professionally acquainted with prosecutor, investigator, and coroner involved in the case). Here, Juror 5 only recognized Honan as someone she had seen at the hospital where she no longer worked. Juror 5 stated that, although she may have worked on some of Honan's patients, her dealings were with his surgical residents and not with him.

¶75 Second, Juror 5 assured the court that her knowledge of Honan would not prevent her from examining the evidence objectively. Although this is not conclusive, it weighs heavily against dismissal absent any indicia that the juror could not objectively analyze the evidence. *See, e.g., id.* at 320–21, 848 P.2d at 1382–83; *Bible*, 175 Ariz. at 574–75, 858 P.2d at 1177–78. Although Juror 5 indicated that she thought all the surgeons at Good Samaritan were "excellent," she repeatedly affirmed that this would

not taint her decision-making. The trial court did not abuse its discretion in refusing to strike Juror 5.

F. Constitutionality of Arizona's Death Penalty

¶76 Lynch contends that Arizona's death penalty is unconstitutional because it involves torture and a lingering death. He cites the "botched" lethal injection of Joseph Wood III as support for the contention that Arizona cannot humanely implement the death penalty.

¶77 The United States and Arizona Constitutions prohibit cruel and unusual punishment. U.S. Const. amend. VIII; Ariz. Const. art. 2, § 15. Punishment involving "torture or a lingering death" is cruel. *In re Kemmler*, 136 U.S. 436, 447 (1890). This Court and the United States Supreme Court have rejected the argument that lethal injection is cruel and unusual punishment. *See, e.g., Glossip v. Gross*, 135 S. Ct. 2726, 2738 (2015); *Baze v. Rees*, 553 U.S. 35, 41 (2008); *State v. Hinchey*, 181 Ariz. 307, 315, 890 P.2d 602, 610 (1995).

¶78 We decline to reverse our prior rulings on this issue. Moreover, Lynch's challenge to the current execution protocol is premature and may instead be raised in Rule 32 proceedings. *State v. Kiles* (*Kiles II*), 222 Ariz. 25, 42 ¶ 92 n.20, 213 P.3d 174, 191 n.20 (2009) (quoting *Andriano*, 215 Ariz. at 510 n.9, 161 P.3d at 553 n.9). Lynch's objections to the current injection procedure – the lack of transparency and the protocol to be used – involve information not contained in the record on appeal and are more properly raised in a Rule 32 petition. *See State v. Walton*, 164 Ariz. 323, 328, 793 P.2d 80, 85 (1990) ("One of the purposes of a Rule 32 proceeding 'is to furnish an evidentiary forum for the establishment of facts underlying a claim for relief, when such facts have not previously been established of record.'" (quoting *State v. Scrivner*, 132 Ariz. 52, 54, 643 P.2d 1022, 1024 (App. 1982))).

G. Independent Review

¶79 Lynch next argues the mitigation evidence he presented is sufficiently substantial to call for leniency. Because Lynch's crimes occurred before 2002, we "independently review the trial court's findings of aggravation and mitigation and the propriety of the death sentence." A.R.S. § 13-755(A). In doing so, we review the record de novo, considering

"the quality and the strength, not simply the number, of aggravating and mitigating factors." *State v. Roseberry*, 210 Ariz. 360, 374 ¶ 77, 111 P.3d 402, 416 (2005) (quoting *State v. Greene*, 192 Ariz. 431, 443 ¶ 60, 967 P.2d 106, 118 (1998)). When "there is a doubt whether the death sentence should be imposed, we will resolve that doubt in favor of a life sentence." *State v. Carlson*, 202 Ariz. 570, 588 ¶ 70, 48 P.3d 1180, 1198 (2002).

1. Aggravation

a. (F)(5)

¶80 An aggravating circumstance is established when "[t]he defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value." A.R.S. § 13-751(F)(5). A murder must be "prompted by the desire for pecuniary gain" for the (F)(5) aggravator to apply. *Anderson*, 210 Ariz. at 351 ¶ 105, 111 P.3d at 393.

¶81 After initially leaving Panzarella's residence, Lynch and Sehwani used his American Express card at two stores and attempted to use it at a third. Panzarella reported the card as lost, and Lynch and Sehwani returned to Panzarella's residence, tied him to a chair, and killed him. Panzarella's debit card and credit card were then repeatedly used, including to secure charges at a motel room registered in Lynch's name. Authorities found Panzarella's gun and magazine in Lynch's motel room and Panzarella's car keys in the truck Lynch was entering at the time of his arrest. These facts establish that Lynch and Sehwani returned to Panzarella's residence intending to steal more and to murder Panzarella to avoid detection. The (F)(5) aggravator was established.

b. (F)(6)

¶82 Under A.R.S. § 13-751(F)(6), an aggravating circumstance is established when "[t]he defendant committed the offense in an especially heinous, cruel or depraved manner." A murder is especially cruel if "the victim was conscious during the violence and the defendant knew or should have known that the victim would suffer mental anguish or physical pain." *State v. Hargrave*, 225 Ariz. 1, 13 ¶ 43, 234 P.3d 569, 581 (2010). "Mental anguish" includes a victim's uncertainty about his fate. *State v. Kiles (Kiles I)*, 175 Ariz. 358, 371, 857 P.2d 1212, 1225 (1993).

¶83 Panzarella's spinal column was not cut, so his nervous system remained intact and he felt pain from the time his throat was cut until he lost consciousness. Panzarella also experienced mental anguish. The evidence demonstrated that he was conscious when bound to the chair. The cord used to bind Panzarella was tied in a large number of knots that were "fairly secured," indicating that Panzarella had ample time to contemplate his fate. Ligatures, abrasions, and bruising on Panzarella's wrists, hands, forearm, shoulder blade, back, and chest indicate that he struggled. *See State v. Djerf*, 191 Ariz. 583, 596 ¶ 50–51, 959 P.2d 1274, 1287 (1998) (inferring mental anguish from contusions and abrasions on victim's wrists). The murder was especially cruel, so the (F)(6) aggravator was established.

2. Mitigation

a. Medical condition

¶84 Lynch emphasizes his medical condition as a reason for leniency. Dr. Altschuler testified at length about Lynch's hepatitis C and complications thereof, including cellulitis in his legs from a bacterial infection, the possibility that he could lose his legs, his several hospitalizations for encephalopathy, and his diminished life expectancy. Defense counsel argued that Lynch would die in prison because of his medical condition and his 21-year sentence for the non-capital offenses. The State's expert, Dr. Honan, agreed that Lynch has "significant chronic liver disease," but did not "see negative prognostic indicators to suggest that he is terminally ill."

¶85 Although there need not be a nexus between mitigation and the crime in order for mitigation to be considered, "failure to establish such a causal connection may be considered in assessing the quality and strength of the mitigation evidence." *Newell*, 212 Ariz. at 405 ¶ 82, 132 P.3d at 849. We assign minimal mitigating value to a defendant's post-murder physical health because it "does not address his pre-murder character, nor does it address his propensities, his record, or the circumstances of the offense." *Kayer*, 194 Ariz. at 440 ¶ 61, 984 P.2d at 48.

¶86 Here, Lynch's medical condition is a mitigating circumstance of only minimal value. The defense suggested that he obtained hepatitis C from receiving a tattoo in jail *after* the murder, so his medical condition is not probative of his character, propensities, or record at the time of the

murder or the circumstances of the offense. Further, we afford minimal value to the fact that a defendant will remain imprisoned for the rest of his life. *State v. Lehr*, 227 Ariz. 140, 155 ¶ 78, 254 P.3d 379, 394 (2011) (reasoning that the fact that a defendant "would remain imprisoned for his natural life if he is not sentenced to death" is entitled to little mitigating value).

b. Killer unknown

¶87 "[P]articipation in a crime may be considered as mitigation where a defendant demonstrates that while he was legally accountable for the conduct of another, his participation in the crime was relatively minor." *State v. Hoskins*, 199 Ariz. 127, 150 ¶ 100, 14 P.3d 997, 1020 (2000), *supplemented* 204 Ariz. 572, 65 P.3d 953 (2003). The evidence demonstrated that Lynch was a major participant in the crime. The American Express receipts discovered in Panzarella's residence indicate that Lynch and Sehwani returned after Panzarella reported the card lost. Property belonging to Panzarella was located in Lynch's motel room and in the truck Lynch was entering at the time of his arrest. There was also ample evidence indicating that Lynch was the killer. The evidence showed that the person who cut Panzarella's throat was standing behind Panzarella, the blood on Lynch's shoes was consistent with him standing in that position, and the footwear impressions at the crime scene were consistent with Lynch's shoes. Lynch's alleged minimal participation is not a mitigating circumstance.

c. Disparity in sentence

¶88 "A disparity in sentences between codefendants and/or accomplices can be a mitigating circumstance if no reasonable explanation exists for the disparity." *Garcia*, 224 Ariz. at 21 ¶ 98, 226 P.3d at 390 (quoting *Kayer*, 194 Ariz. at 439 ¶ 57, 984 P.2d at 47). Disparity is not mitigating if it results from factors suggesting the appropriateness of the sentences, such as a difference in culpability or "an appropriate plea agreement with one of the defendants." *State v. Detrich*, 188 Ariz. 57, 69, 932 P.2d 1328, 1340 (1997). Here, evidence suggested that Lynch was the killer, and Sehwani received a life sentence as a result of a plea agreement. Sentencing disparity is not a mitigating circumstance here.

d. Drug abuse

¶89 Lynch argues that his drug use is both a statutory and non-statutory mitigating circumstance. A mitigating circumstance is proven if "[t]he defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution." A.R.S. § 13-751(G)(1). Lynch asserts that drug use impaired his ability to appreciate wrongfulness. In such a case, the defendant must show some relationship between drug use and the offense to avail himself of the (G)(1) mitigating circumstance. *State v. Murdaugh*, 209 Ariz. 19, 34 ¶ 74, 97 P.3d 844, 859 (2004); *see also State v. Sansing*, 206 Ariz. 232, 239–40 ¶¶ 28–29, 77 P.3d 30, 37–38 (2003) (finding failure to prove (G)(1) factor where defendant presented "only minimal testimony about his drug use on the day of the murder").

¶90 Lynch presented evidence that he suffered from drug and alcohol abuse and that he used drugs around the time of the offense. He also explained how crack cocaine use affects the brain. Lynch failed to show a relationship between his drug and alcohol use and the offense, however, other than merely suggesting that he used crack cocaine near the time of the murder. Any drug use is therefore entitled to minimal mitigating value.

¶91 As to non-statutory mitigation, Lynch's drug abuse is entitled to minimal value. Even if a defendant establishes his drug addiction, we give minimal value to this evidence if he "'fail[s] to tie his drug abuse to the crime or to his mental functioning' when the murder occurred." *Garcia*, 224 Ariz. at 22 ¶ 104, 226 P.3d at 391 (quoting *State v. Pandeli*, 215 Ariz. 514, 532 ¶ 75, 161 P.3d 557, 575 (2007)). Although Lynch showed that he abused drugs, he did not tie his drug abuse to the crime other than by stating generally that crack cocaine use causes delusional thinking. Lynch's drug abuse deserves little value as a mitigator.

e. Dysfunctional childhood and abuse

¶92 Lynch presented evidence that he was raised in a dysfunctional family where he was physically and emotionally abused, his parents neglected him, and his parents were alcoholics. A difficult childhood may be a mitigating circumstance, but we give it little value

"absent a showing that it affected the defendant's conduct in committing the crime." *Garcia*, 224 Ariz. at 22 ¶ 107, 226 P.3d at 391. The amount of time that has passed since the defendant's childhood is relevant. *Prince*, 226 Ariz. at 541–42 ¶ 111, 250 P.3d at 1170–71 ("Prince was twenty-six years old when he killed Cassandra, attenuating the impact of his dysfunctional childhood on his conduct."); *Garcia*, 224 Ariz. at 22 ¶ 107, 226 P.3d at 391 (affording little value to difficult family background because defendant was thirty-nine at the time of the murder and "no evidence linked his childhood experiences to the murder"); *State v. Ellison*, 213 Ariz. 116, 144 ¶ 136, 140 P.3d 899, 927 (2006) (reasoning that "childhood troubles deserve[d] little value as a mitigator for the murders [defendant] committed at age thirty-three").

¶93 Here, Lynch was thirty-nine years old at the time of the murder. He failed to establish that his childhood affected his conduct. Lynch's dysfunctional family background deserves little value as a mitigator.

f. Brother's death

¶94 Lynch also asserts that the drug-overdose death of his brother, Donald, is a mitigating factor. Donald died after the murder, so his death deserves little value as mitigation. *See Newell*, 212 Ariz. at 405 ¶ 82, 132 P.3d at 849 (reasoning that even though we do not require a nexus between the mitigation and the crime before we consider mitigation evidence, the absence of "such a causal connection may be considered in assessing the quality and strength of the mitigation evidence").

g. Lack of future dangerousness and other sentences

¶95 Lynch also presented evidence that he would not be a danger to prison staff, inmates, or the general public if he received a life sentence. He also offered as mitigation his twenty-one-year sentence for the non-capital crimes that would run consecutively to the sentence he received for the first-degree murder. We "accord minimal weight to the prospect that [a defendant] will be a 'model prisoner'" because "[a]ll prisoners are expected to behave in prison." *Lehr*, 227 Ariz. at 155 ¶ 78, 254 P.3d at 394. The fact that a defendant "would remain imprisoned for his natural life if he is not sentenced to death" is also entitled to little value. *Id.*; *see also Garcia*, 224 Ariz. at 22 ¶ 108, 226 P.3d at 391 (affording minimal value to

defendant's argument that he posed no risk of future dangerousness because he would never be released from prison). We give Lynch's low risk of misbehavior in prison and consecutive non-capital sentences little value as mitigation.

3. Propriety of death sentence

¶96 In light of the (F)(5) and (F)(6) aggravating circumstances, which reflected an especially cruel murder committed for pecuniary gain, we conclude that Lynch has not identified mitigating circumstances sufficiently substantial to call for leniency.

III. CONCLUSION

¶97 For the reasons stated, we affirm Lynch's death sentence.[3]

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[3] Lynch raises twenty-six additional constitutional claims that he acknowledges this Court has previously rejected but that he wishes to preserve for federal review. We decline to revisit these claims.

APPENDIX – B –

IN THE SUPREME COURT
STATE OF ARIZONA

STATE OF ARIZONA, Appellee, v. SHAWN PATRICK LYNCH, Appellant.	No. CR-12-0359-AP Maricopa County Superior Court No. CR2001-092032 A

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 6

ISSUES PRESENTED FOR REVIEW 16

ARGUMENT 1 17

THE SENTENCE IN THIS CASE WAS TAINTED BY SEVERAL INSTANCES OF PROSECUTORIAL MISCONDUCT.

ARGUMENT 2 80

THE TRIAL COURT IMPROPERLY LIMITED THE SENTENCING PHASE WHEN THE TRIAL COURT DENIED LYNCH'S MOTION FOR RETRIAL OF AGGRAVATING CIRCUMSTANCES AND NOTICE OF MITIGATION EVIDENCE.

ARGUMENT 3 96

THE TRIAL COURT VIOLATED LYNCH'S RIGHTS WHEN THE COURT IMPROPERLY REFUSED TO INSTRUCT THE JURY ACCORDING TO *SIMMONS V. SOUTH CAROLINA*.

TABLE OF CONTENTS (continued)

Page

ARGUMENT 4 108

LYNCH WAS DEPRIVED OF HIS RIGHT TO A PROPERLY CONSTITUTED JURY WHEN THE TRIAL COURT FAILED TO ACCURATELY FOLLOW THE PROCEDURE SET FORTH IN *BATSON V. KENTUCKY*. AS A RESULT OF THE TRIAL COURT'S FAILURE, THE STATE WAS PERMITTED TO STRIKE TWO JURORS WITHOUT PROVIDING SATISFACTORY RACE-NEUTRAL REASONS FOR THE STRIKES.

ARGUMENT 5 121

THE TRIAL COURT INCORRECTLY DENIED LYNCH'S MOTION TO STRIKE JUROR 5 WHEN JUROR 5 POSSESSED PERSONAL KNOWLEDGE FROM OUTSIDE THE RECORD REGARDING THE EXPERIENCE AND REPUTATION OF AN EXPERT WITNESS.

ARGUMENT 6 139

MITIGATION IS SUFFICIENTLY SUBSTANTIAL TO CALL FOR LENIENCY

ARGUMENT 7 149

ARIZONA DEATH PENALTY IS UNCONSTITUTIONAL.

CONCLUSION 159

TABLE OF CITATIONS

Page

UNITED STATES SUPREME COURT CASES

Ball v. United States, 470 U.S. 856 (1985) 60
Batson v. Kentucky, 476 U.S. 79 (1986)
..... 16, 108, 109, 111, 112, 113, 114, 115, 116, 117 119, 126, 130
Baze v. Rees, 553 U.S. 35 (2008) 157
Duncan v. Louisiana, 391 U.S. 145 (1968) 124
Eddings v. Oklahoma, 455 U.S. 104 (1982) 59, 89, 106
Enmund v. Florida, 458 U.S. 782 (1982) 52, 87, 88, 90, 91, 95
Georgia v. McCollum, 505 U.S. 42 (1992) 125
Griffin v. California, 380 U.S. 609 (1965) 66
Hernandez v. New York, 500 U.S. 352 (1991) 112
Holland v. Illinois, 493 U.S. 747 (1990) 111
In re Medley, 134 U.S. 160 (1890) 148
Irvin v. Dowd, 366 U.S. 717 (1961) 125
Johnson v. California, 545 U.S. 162 (2005) 125
Kelly v. South Carolina, 534 U.S. 246 (2002) 98, 101
Lockett v. Ohio, 438 U.S. 586 (1978) 89, 92, 106
Miller-El v. Cockrell, 537 U.S. 322 (2003) 112
Miller-El v. Dretke, 545 U.S. 231 (2005) 117, 130
Pandeli v. Arizona, 536 U.S. 953 (2002) 149, 153
Powers v. Ohio, 499 U.S. 400 (1991) 125
Press-Enterprise Co. v. Superior Court of California, Riverside,
464 U.S. 501 (1984) 126
Press-Enterprise Co. v. Superior Court of California for Riverside,
478 U.S. 1 (1986) 126
Printz v. U.S., 521 U.S. 898 (1997) 91
Proffitt v. Florida, 428 U.S. 242 (1976) 140
Purkett v. Elem, 514 U.S. 765 (1995) 112
Ring v. Arizona, 536 U.S. 584 (2002) 91, 151
Roper v Simmons, 543 U.S. 551 (2005) 150
Sattazahn v. Pennsylvania, 537 U.S. 101 (2003) 154

TABLE OF CITATIONS

Page

UNITED STATES SUPREME COURT CASES (continued)

Simmons v. South Carolina, 512 U.S. 154 (1994) 16, 96, 97, 98, 99, 100, 102, 104, 105, 106, 107
Snyder v. Louisiana, 552 U.S. 472 (2008) 112
Sochor v. Florida, 504 U.S. 527 (1992) 90
Solem v. Helm, 463 U.S. 277 (1983) 102
Tison v. Arizona, 481 U.S. 137 (1987) 52, 87, 88, 90, 91, 95
Trop v. Dulles, 356 U.S. 86 (1958) 150
Turner v. State of Louisiana, 379 U.S. 466 (1965) 125, 132
U.S. v. Abel, 469 U.S. 45 (1984) 130
United States v. Young, 470 U.S. 1 (1985) 55
Woodson v. North Carolina, 428 U.S. 280 (1976) 106

OTHER FEDERAL CASES

Boyle v. Million, 201 F.3d 711 (6th Cir. 2000) 19
Coombs v. Diguglielmo, 616 F.3d 255 (3d Cir. 2010) 115
Green v. LaMarque, 532 F.3d 1028 (9th Cir. 2008) 116
Jamerson v. Runnels, 713 F.3d 1218 (9th Cir. 2013) 116
McCurdy v. Montgomery Cnty., 240 F.3d 512 (6th Cir. 2001) 114
Parker v. Allen, 565 F.3d 1258 (11th Cir. 2009) 118
Reed v. Quarterman, 555 F.3d 364 (5th Cir. 2009) 118
Smith v. Cain, 708 F.3d 628 (5th Cir. 2013) 117
United States v. Atcheson, 94 F.3d 1237 (9th Cir.1996) 40
U.S. v. Drummond, 481 F.2d 62 (2d Cir. 1973) 20
U.S. v. McAllister, 693 F.3d 572 (6th Cir. 2012) 113, 114
U.S. v. McMath, 559 F.3d 657 (7th Cir. 2009) 113
U.S. v. Pearson, 746 F.2d 787 (11th Cir. 1984) 57
U.S. v. Rutledge, 648 F.3d 555 (7th Cir. 2011) 112
U.S. v. Sanchez, 176 F.3d 1214 (9th Cir. 1999) 21, 47
U.S. v. Sanchez-Lima, 161 F.3d 545 (9th Cir. 1998) 21

TABLE OF CITATIONS

Page

ARIZONA SUPREME COURT CASES

In re Peasley, 208 Ariz. 27, 90 P.3d 764 (2004) 73, 74
In re Zawada, 208 Ariz. 232, 92 P.3d 862 (2004) 38, 74
Lynn v. Reinstein, 205 Ariz. 186, 68 P.3d 412 (2003) 155
Merryweather v. Pendleton, 91 Ariz. 334, 372 P.2d 335 (1962) 108
Pool v. Superior Court In & For Pima Cnty., 139 Ariz. 98, 677 P.2d 261 (1984) 73
Salt River Valley Water Users' Ass'n v., 31 Ariz. 39, 250 P 356 (1926) 128
State v. Anderson, 210 Ariz. 327, 111 P.3d 369 (2005) 17, 139
State v. Andriano, 215 Ariz. 497, 161 P.3d 540 (2007) 74, 77, 139
State v. Armstrong, 218 Ariz. 451, 189 P.3d 378 (2008) 84, 85
State v. Arnett, 119 Ariz. 38, 579 P.2d 542 (1978) 121, 138
State v. Beaty, 158 Ariz. 232, 762 P.2d 519 (1988) 149
State v. Benson, 232 Ariz. 452, 307 P.3d 19 (2013) 100
State v. Bible, 175 Ariz. 549, 858 P.2d 1152 (1993) 18, 19, 51, 72
State v. Blazak, 114 Ariz. 199, 560 P.2d 54 (1977) 140
State v. Blazak, 131 Ariz. 598, 643 P.2d 694 (1982) 149
State v. Bocharski, 218 Ariz. 476, 189 P.3d 403 (2008)(*Bocharski II*) 155,156
State v. Bolton, 182 Ariz. 290, 896 P.2d 830 (1995) 19
State v. Boyston, 231 Ariz. 539, 298 P.3d 887 (2013) 100
State v. Cannon, 148 Ariz. 72, 713 P.2d 273 (1985) 40
State v. Canez, 202 Ariz. 133, 42 P.3d 564 (2002) 57
State v. Carlson, 202 Ariz. 570, 48 P.3d 1180 (2002) 140
State v. Carreon, 210 Ariz. 54, 107 P.3d 900 (2005) 155
State v. Chappell, 225 Ariz. 229, 236 P.3d 1176 (2010) 99, 102
State v. Comer, 165 Ariz. 413, 799 P.2d 333 (1990) 37, 39
State v. Cota, 229 Ariz. 136, 272 P.3d 1027 (2012) 100, 102
State v. Cropper, 206 Ariz. 153, 76 P.3d 424 (2003) 83
State v. Cruz, 175 Ariz. 395, 857 P.2d 1249 (1993) 118
State v. Cruz, 218 Ariz. 149, 181 P.3d 196 (2008) 98, 99
State v. Dann, 220 Ariz. 351, 207 P.3d 604 (2009) 96, 97, 99, 102, 154
State v. Daymus, 90 Ariz. 294, 367 P.2d 647 (1961) 56
State v. Decello, 113 Ariz. 255, 550 P.2d 633 (1976) 67, 68

TABLE OF CITATIONS

Page

ARIZONA SUPREME COURT CASES (continued)

State v. Dixon, 226 Ariz. 545, 250 P.3d 1174 (2011) 74
State v. Dumaine, 162 Ariz. 392, 783 P.2d 1184 (1989) 54
State v. Eddington, 228 Ariz. 361, 266 P.3d 1057 (2011) 125, 127, 128, 132
State v. Ellison, 213 Ariz. 116, 140 P.3d 899 (2006) 156
State v. Gallardo, 225 Ariz. 560, 242 P.3d 159 (2010) 74, 76, 77, 78
State v. Garcia, 224 Ariz. 1, 226 P.3d 370 (2010) 87, 98, 99, 100
State v. Garza, 216 Ariz. 56, 163 P.3d 1006 (2007) 87
State v. Gerlaugh, 144 Ariz. 449, 698 P.2d 694 (1985) 57
State v. Green, 60 Ariz. 63, 131 P.2d 411 (1942) 130
State v. Greene, 192 Ariz. 431, 967 P.2d 106 (1998). 139
State v. Gretzler, 135 Ariz. 42, 659 P.2d 1 (1983) 59
State v. Gulbrandson, 184 Ariz. 46, 906 P.2d 579 (1995) 153
State v. Hansen, 215 Ariz. 287, 160 P.3d 166 (2007) 80
State v. Hardy, 230 Ariz. 281, 283 P.3d 12 (2012) 99, 102, 108, 112
State v. Hargrave, 225 Ariz. 1, 234 P.3d 569 (2010) 99, 102
State v. Harrod, 200 Ariz. 309, 26 P.3d 492 (2001) 149
State v. Hausner, 230 Ariz. 60, 280 P.3d 604 (2012) 100
State v. Hughes, 193 Ariz. 72, 969 P.2d 1184 (1998) 48, 47
State v. Johnson, 116 Ariz. 399, 569 P.2d 829 (1977) 130
State v. Johnson, 212 Ariz. 425, 133 P.3d 735 (2006) 156
State v. Jorgenson, 198 Ariz. 390, 10 P.3d 1177 (2000) 73
State v. Kiles (Kiles II), 222 Ariz. 25, 213 P.3d 174 (2009) 139
State v. Leon, 190 Ariz. 159, 945 P.2d 1290 (1997) 50, 54
State v. Lynch, 225 Ariz. 27, 234 P.3d 595 (2010) 64, 74, 76, 77, 78, 80, 141
State v. Medina, 232 Ariz. 391, 306 P.3d 48 (2013) 153, 154
State v. McGill, 213 Ariz. 147, 140 P.3d 930 (2006) 80, 96, 121
State v. Miles, 186 Ariz. 10, 918 P.2d 1028 (1996) 157
State v. Minnitt, 203 Ariz. 431, 55 P.3d 774 (2002) 73
State v. Montano, 206 Ariz. 296, 77 P.3d 1246 (2003) 83
State v. Morris, 215 Ariz. 430, 160 P.3d 203 (2007) 47, 69, 74, 75, 77
State v. Nelson, 229 Ariz. 180, 273 P.3d 632 (2012) 96

TABLE OF CITATIONS

Page

ARIZONA SUPREME COURT CASES (continued)

State v. Newell, 212 Ariz. 389, 132 Ariz. 833 (2006) 46, 58, 139
State v. Pandeli, 215 Ariz. 514, 161 P.3d 557 (2007) 83, 84
State v. Patton, 120 Ariz. 386, 586 P.2d 635 (1978) 144
State v. Poyson, 198 Ariz. 70, 7 P.3d 79 (2000) 152
State v. Prince, 226 Ariz. 516, 250 P.3d 1145 (2011) 59
State v. Reeves, 233 Ariz. 182, 310 P.3d 970 (2013) 89, 106, 154
State v. Richmond, 114 Ariz. 186, 560 P.2d 41 (1976) 140
State v. Ring, 200 Ariz. 267, 25 P.3d 1139 (2001)(*Ring I*)
rev 'd on other grounds by Ring II 153
State v. Ring, 204 Ariz. 534, 65 P.3d 915 (2003) *(Ring III)* 151
State v. Roque, 213 Ariz. 193, 141 P.3d 368 (2006) 17, 38, 152
State v. Roseberry, 210 Ariz. 360, 111 P.3d 402 (2005) 139
State v. Ross, 180 Ariz. 598, 886 P.2d 1354 (1994) 151
State v. Salazar, 173 Ariz. 399, 844 P.2d 566 (1992) 150, 152
State v. Sansing, 200 Ariz. 347, 26 P.3d 1118 (2001) 150, 151
State v. Schrock, 149 Ariz. 433, 719 P.2d 1049 (1986) 67
State v. Serna, 163 Ariz. 260, 787 P.2d 1056 (1990) 56
State v. Smith, 160 Ariz. 507, 774 P.2d 811 (1989) 87
State v. Stuard, 176 Ariz. 589, 863 P.2d 881 (1993) 57
State v. Tims, 143 Ariz. 196, 693 P.2d 333 (1985) 56
State v. Trostle, 191 Ariz. 4, 951 P.2d 869 (1997) 57, 68
State v. Valencia, 132 Ariz. 248, 645 P.2d 239 (1982) 140
State v. Van Adams, 194 Ariz. 408, 984 P.2d 16 (1999) 157
State v. Velazquez, 216 Ariz. 300, 166 P.3d 91 (2007) 47, 58
State v. Watson, 129 Ariz. 60, 628 P.2d 943 (1981) 141
State v. White, 168 Ariz. 500, 815 P.2d 869 (1991) 141
Taylor v. DiRico, 124 Ariz. 513, 606 P.2d 3 (1980) 69

TABLE OF CITATIONS

Page

ARIZONA COURT OF APPEALS CASES

Lopez v. Farmers Ins. Co., 177 Ariz. 371, 868 P.2d 954 (App. 1993) 128
State ex rel. Thomas v. Foreman, 211 Ariz. 153, 118 P.3d 1117 (App. 2005)..... 156
State v. Martinez, 130 Ariz. 80, 634 P.2d 7 (App. 1981)..... 67
State v. I, 198 Ariz. 372, 10 P.3d 630 (App. 2000) 21, 23, 24, 25, 26
State v. Rosario, 195 Ariz. 264, 987 P.2d 226 (App. 1999) 100
State v. Sowards, 147 Ariz. 185, 709 P.2d 542 (App. 1984) 69
Nordstrom v. Cruikshank, 213 Ariz. 434, 142 P.3d 1247 (App. 2006) 85

OTHER STATE CASES

Anderson v. State, 525 S.W.2d 20 (Tx. App. 1975)..... 48
Barrett v. Commonwealth, 262 Va. 823, 553 S.E.2d 731 (Va. 2001)..... 126
Carter v. State, 356 So.2d 67 (Fla. Dist. Ct. App. 1978)..... 47
Cobb v. State, 283 Ga. 388, 658 S.E.2d 750 (Ga. 2008)..... 94
Commonwealth v. Long, 392 A.2d 810 (Pa. Super. Ct. 1978)..... 47
Commonwealth v. Sargent, 385 A.2d 484 (Pa. Super. Ct. 1978)..... 47
Dillon v. State, 311 Ark. 529, 844 S.W.2d 944 (Ark. 1993)..... 30
Edmonds v. State, 372 Md. 314, 812 A.2d 1034 (Md. 2002) 117
Fisher v. State, 128 Md.App 79, 736 A.2d 1125 (Md.App. 1999)..... 23
Hunter v. State, 397 Md. 580, 919 A.2d 63 (Md. 2007)..... 23
Jones v. State, 938 A.2d 626 (Del. 2007)..... 116
Liggett v. People, 135 P.3d 725 (Colo. 2006)..... 25
McCarty v. State, 765 P.2d 1215 (Okla.Cr.App. 1988)..... 48
Padgett v. State, 590 P.2d 432 (Alaska 1979)..... 94
People v. Davis, 231 Ill.2d 349, 899 N.E.2d 238 (Ill. 2008) 116
People v. Levesque, 35 Cal.App.4th 530, 41 Cal.Rptr.2d 439 (Cal.App. 1995) 29
People v. Liggett, 114 P.3d 85 (Colo.App. 2005)..... 25, 26
People v. Pitts, 223 Cal.App.3d 606, 273 Cal.Rptr. 757 (Cal.App. 1990) 29
People v. Vera, 94 A.D.2d 728, 462 N.Y.S.2d 467 (N.Y Supreme Ct. 1983)..... 48
People v. Weller, 258 N.E.2d 806 (Ill. App. Ct. 1970)..... 47

TABLE OF CITATIONS

Page

OTHER STATE CASES (continued)

State v. Casteneda-Perez, 61 Wash.App. 354, 810 P.2d 74 (Wash.App. 1991)..... 26
State v. Daye, 281 N.C. 592, 189 S.E.2d 481 (N.C. 1972)..... 20
State v. Dobbins, 725 N.W.2d 492 (Minn. 2006)..... 25
State v. Duran, 140 N.M. 94, 140 P.3d 515 (N.M. 2006)..... 26
State v. Gardner, 127 Ohio App.3d 538 (Ohio App. 1998)..... 20
State v. Graves, 668 N.W.2d 860 (Iowa 2003)..... 26, 28
State v. Herndon, 292 N.C. 424, 233 S.E.2d 557 (N.C. 1977)..... 20
State v. Lundbom, 96 Or. App. 458, 773 P.2d 11 (1989)..... 47
State v. Mayhorn, 720 N.W.2d 776 (Minn. 2006)..... 40
State v. Morton, 701 N.W.2d 225 (Minn. 2005)..... 24, 25
State v. Pierce, 169 Wash. App. 533, 280 P.3d 1158 (Wash.App. 2012)..... 69
State v. Pilot, 595 N.W.2d 511 (Minn., 1999)..... 24, 25
State v. Pona, 926 A.2d 592 (R.I. 2007)..... 116
State v. Rhodes, 988 S.W.2d 521 (Mo. 1999)..... 70
State v. Soares, 72 Haw. 278, 815 P.2d 428 (Haw. 1991)..... 29, 30
State v. Singh, 259 Conn. 693, A.2d 226 (Conn. 2002)..... 26
Thornton v. State, 852 So.2d 911 (Fla.App. 2003)..... 48
Zayre, Inc. v. Carswell, 348 So.2d 45 (Fla.App. 1977)..... 20

CONSTITUTIONAL PROVISIONS

United States Constitution
Fifth Amendment..... 66, 68, 152, 155, 157
Sixth Amendment..... 124, 131, 137, 152, 155, 156, 157
Eighth Amendment 89, 91, 92, 103, 104, 105, 106, 149, 150, 151, 152, 153, 154, 155, 156, 157
Fourteenth Amendment. 124, 131, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158

TABLE OF CITATIONS

Page

CONSTITUTIONAL PROVISIONS (continued)

Arizona Constitution

Article 2 § 1 ..... 150, 151, 155, 156, 157
Article 2 § 4 ..... 149, 150, 151, 152, 155, 156, 157
Article 2 § 10 151
Article 2 § 13 ..... 150, 158
Article 2 § 15 ..... 149, 151, 152, 153, 155, 156, 158
Article 2 § 23 ..... 122, 129, 155, 156, 158
Article 2 § 24 ..... 122, 129, 135, 155, 156, 158
Article 2 § 25 151
Article 6 § 5(3) 5

STATUTES

Arizona Revised Statutes

§ 13-454 140
§ 13-703 ..... 153, 154
§ 13-703(A) 84
§ 13-703.01 ..... 85, 91
§ 13-703.01(C) 84, 85
§ 13-703.01(D) 84
§ 13-703.01(N) 84, 85, 91
§ 13-703.01(P) 84, 87
§ 13-751 ..... 96, 99, 101, 153, 154
§ 13-751(G) 60
§ 13-752 ..... 82, 91, 101
§ 13-752(C) 83, 84
§ 13-752(D) 83, 84
§ 13-752(K) 80, 82, 83
§ 13-752(N) 81, 82, 83, 84, 86, 87, 88, 90
§ 13-752(P) 87
§ 13-752(Q) 96

TABLE OF CITATIONS

Page

STATUTES

Arizona Revised Statutes (continued)

§ 13-4031 (2001) 5
§ 13-4036 5
§ 13-4037 5
§ 21-211 ..... 126, 127, 130
§ 41-1604.09 101
§ 41-1604.09(I) 100, 101

OTHER AUTHORITIES

Batson's Blind-Spot: Unconscious Stereotyping
and the Peremptory Challenge,
Anthony Page, 85 B.U.L.Rev. 155, 161 (2005) 130

Devotions Upon Emergent Occasions,
John Donne, pg. 108-09 72

Extrajudical Attorney Speech and Pending Criminal Prosecutions:
The Investigatory Commission Meets A.B.A. Model Rule 3.6,
Joan C. Bohl, 44 U. Kan. L. Rev. 951 (1996) 20

Facts and Figures on the Death Penalty (January 1, 2006) 150

Universal Declaration of Human Rights,
GA Res. 217A (III), U.N. GAOR, 3d Sess. Art. 3, U.N. Doc. A/810 (1948) 150

Wikepedia, *Ad hominem*,
http://en.wikipedia.org/wiki/Ad_hominem 49

Wikepedia, Poisoning the well,
http://en.wikipedia.org/wiki/Poisoning_the_well 49

STATEMENT OF THE CASE

This case previously came to this Court on appeal. (*See State v. Lynch*, 225 Ariz. 27, 234 P.3d 595 (2010)). This Court summarized the factual and procedural history of this case at that point. (*Id.* at ¶¶ 2-13). This Court found error and remanded for a new penalty phase. (*Id.* at ¶¶ 82-88).

After remand, the parties met at a status conference on August 23, 2010. (Instrument ("I.") 620). The parties continued the conference to October 19, 2010. (*Id.*). On October 19, 2010, the Defense indicated they were in the process of preparing a plea request to submit to the State. (Reporter's Transcript ("RT") 10/19/2010, 2-3). The status conference was reset. (I. 621). Before the next status conference, held on November 18, 2010, the Defense had submitted a plea request based upon Mr. Lynch's medical condition (Hepatitis C) and the State wanted an opportunity to independently verify the medical condition with an independent doctor. (I. 624; RT 11/18/2010, 3-4). At the next hearing, February 2, 2011, the State had not yet retained an expert because the State had been working out issues with the Department of Corrections regarding transportation of Mr. Lynch to an expert for evaluation. (RT 2/2/2011, 2-5). The evaluation had not been completed by the time of the next hearing, on March 10, 2011. (RT 3/10/2011, 2-4). Defense counsel mistakenly believed Mr. Lynch's records had been disclosed earlier. (*Id.* at 3). Upon

realizing the mistake, the Defense disclosed Mr. Lynch's medical records. (*Id.*). The State was unable to retain an expert by the next court date, May 18, 2011. (RT 5/18/2011, 3). On June 29, 2011, the Court indicated that the expert report had been disclosed the day prior. (RT 6/29/2011, 2). The matter was continued to assess whether a plea agreement could be reached. (*Id.* at 2-3). At the August 8, 2011 status conference, the State rejected the plea request and the trial court set dates for motions and a hearing on motions. (RT 8/8/2011, 2-5).

On July 12, 2012, Lynch filed a Motion for Retrial of Aggravating Circumstances. (I. 637). The State responded to this Motion on March 7, 2012. (I. 654). The Defense filed a Notice of Mitigation Evidence re: Guilty Verdicts on February 27, 2012. (I. 647, 648). The State objected to the introduction of guilt phase verdict forms on March 13, 2012. (I. 661). On March 2, 2012, Lynch filed Defendant's Waiver of Right to be Considered for Release-Eligible Sentence and Motion for Jury Instruction Regarding Release Ineligibility (*Simmons* Instruction), (I. 650), and a Supplemental Notice of Mitigating Circumstances and Witnesses, (I. 651). The State objected to the waiver on March 16, 2012. (I. 663).

The trial court ruled on these motions, as well as a number of motions *in limine*, on April 6, 2012. (I. 678). The trial court denied Lynch's request to retry aggravating

circumstances, request to introduce guilt phase verdict forms, and waiver of release-eligible sentence. (*Id.*).

A Capital Case Resolution Management Conference was held on April 19, 2012. (I. 681). At the end of this hearing the trial date was affirmed.

Jury selection began on June 26, 2012. (I. 707). The jury was impaneled on July 17, 2012. (I. 724). The court read instructions and the parties presented opening statements on the same day. (*Id.*). K.P and A.P. presented victim impact statements at the end of the day. (*Id.*). On July 18, 2012, Lynch's mitigation presentation began. (I. 732). Kim Kloese, Jim Lynch, and Dr. Jolie Brams testified. (*Id.*). Dr. Brams continued her testimony the next day. (I. 769). On July 23, 2012, James Aiken and Dr. Gerald Altschuler testified. (I. 753). On July 24, 2012, Susan Alling testified. (I. 760). The Defense rested after Alling's testimony and the State's case commenced. (*Id.*).

The State called Hugh Lockerby and Dr. Philip Keen on July 24, 2012. (*Id.*). Dr. Keen's testimony continued the next day. (I. 761). A.P., Dr. Janeen DeMarte, and Penny Dechant also testified on July 25, 2012. (*Id.*). On July 26, 2012, the State called Penny Dechant, Tracy Ramsay, Allen Hale, Michael Lawler, and Dr. Vincent Honan. (I. 762). The State's case next continued on August 6, 2012. (I. 778). The State recalled Hugh Lockerby and A.P and called Mark Walther, Kevin Furia,

Christopher Hall, Tracie Paolillo, Allen Steve Garrett, and Steven Clemens. (*Id.*). Steven Clemens continued his testimony the next day. (I. 781). The State again recalled Hugh Lockerby and called Kathryn Burton, Michael Case, and Dennis Olson. (*Id.*). After Mr. Olson's testimony, the State rested. (*Id.*).

Lynch's rebuttal began on August 8, 2012. (I. 782). Amy Blakely, Vincent Marchese, and Paul Arnold testified. (*Id.*). Transcripts of an interview of Michael Sehwani were also read to the jury. (*Id.*). After the transcripts were read, the Defense rested. (*Id.*).

On August 9, 2012, the trial court read final instructions to the jury and both sides presented closing arguments. (I. 783). After alternates were designated, the jury began deliberations. (*Id.*).

The jury reached a verdict of death on August 16, 2012. (I. 784 (verdict form), I. 793 (minute entry)). Pursuant to the jury verdict, the trial court sentenced Shawn Lynch to death. (I. 789).

Shawn Lynch filed his Notice of Appeal on August 17, 2012. (I. 788). The Defense also filed a Motion for New Trial on August 21, 2012. (I. 790). The State Responded on August 24, 2012. (I. 794). The trial court denied the motion on August 28, 2012. (I. 797).

Shawn Lynch filed his Notice of Appeal on August 17, 2012. (I. 788). The Defense also filed a Motion for New Trial on August 21, 2012. (I. 790). The trial court denied the motion. (I. 797). This Court has jurisdiction pursuant to Article 6, § 5(3) of the Arizona Constitution, A.R.S. § 13-4031 (2001), A.R.S. § 13-4036, and A.R.S. § 13-4037

STATEMENT OF FACTS

This is a penalty phase remand. Many of the facts in this case are necessary to support the argument on the issues and are included in the arguments section and, in the interests of space limitations, are not rehashed in this section but it is requested that those facts detailed in the arguments sections be considered as a part of the Statement of Facts as well.

The first witness called by the defense in mitigation was Kim Kloese. RT 7/18/2012, 4. Kloese is Shawn Lynch's sister. *Id.* at 6. Kloese provided insight as to Lynch's childhood. *Id.* Kloese testified that her siblings were James (Jim) Lynch, Shawn Lynch, Donald Lynch and herself. *Id.* Their parents were Michael Riley Lynch and Rosalie Lynch. *Id.* Michael Riley Lynch was an alcoholic with a temper. *Id.* at 6-7 He was violent in his approach to child discipline. *Id.* However, this discipline was primarily directed at two siblings: Jim and Shawn Lynch. *Id.* at 7 As examples, Kloese recalled that Michael Riley Lynch would beat Shawn and Jim with a cat o' nine tails belt, force them to kneel on rocks, and once held Shawn's hand over a fire on the stove. *Id.* at 7-8. Michael Riley Lynch was also emotionally abusive. *Id.* at 8. He would scream at his children and would expect his children to handle themselves as adults. *Id.* Michael Riley Lynch's marriage to Rosalie Lynch was also abusive. *Id.* at 8-9. "They were constantly fighting. He was always drunk

and when I say fighting we are not talking about just screaming, they were punching each other and kicking each other and throwing each other on the ground." *Id.* at 9. While the police were called on occasion, the police simply removed Michael Lynch from the house and took no further action. *Id.* at 9-10. Michael Lynch died in 1981 as the result of a motorcycle accident. *Id.* at 10, 21. At the time of his death he had a pending DUI. *Id.* at 10. Michael Lynch had accumulated a number of DUI's over his life. *Id.* at 11.

Kloese testified that Rosalie Lynch was also emotionally abusive. *Id.* at 12. Rosalie Lynch had mental health problems and may have been schizophrenic. *Id.* Rosalie Lynch had been institutionalized for her mental health problems, including once when she was just nineteen years old. *Id.* at 13. Rosalie had also attempted suicide during her life. *Id.* at 14. Kloese also testified that Rosalie Lynch would often leave, sometimes for months at a time. *Id.* at 14-15. When Rosalie left for three months, Michael Lynch was in rehab for his alcohol problems. *Id.* at 15. Kloese testified:

> My dad was in a rehab for alcoholism and she was leaving and I was scared. And I asked her if I could go to the store with her and she said, no. And I said, why are you taking Velvet, the dog and she said, I'll be right back, don't worry, I'll be right back. And I was crying and I really wanted to go but she never came back.

Id.

Fortunately, Shawn and Jim were able to get in contact with the babysitter, Kathy Keltz, who was the primary caregiver whenever Michael and Rosalie Lynch disappeared. *Id.* at 15-16. Rosalie Lynch died in 2005. *Id.* at 13.

Shawn's paternal grandfather was also very stern and strict. *Id.* at 17 Kloese described that their grandfather was strict even on the siblings and would discipline them both verbally and physically. *Id.* Shawn's maternal grandfather was also an alcoholic who would make up excuses to leave the house so that he could drink. *Id.* at 17-18.

Jim Lynch, the oldest brother, is also incarcerated. *Id.* at 18. Jim moved around to a number of states and constantly got in trouble with DUI's and fights. *Id.* at 19. Jim suffered from both alcohol and cocaine addiction. *Id.* Kim also testified that Jim attempted to commit suicide twice. *Id.* at 26.

Donald Lynch died in 2001 of a drug overdose. *Id.* at 19-20. Donald had suffered from an addiction to cocaine and heroin. *Id.* at 20-21. Donald had been on

the motorcycle with his father when Michael Lynch was in an accident and died in 1981. *Id.* at 21. Donald "was hospitalized for a couple of months. His leg was in traction. He had to relearn to speak and to think and to walk. He had concussions, mental damage." *Id.* Before Donald's death, Donald had been living in hospice. *Id.* at 22. Donald was in hospice due to renal failure that was caused by juvenile diabetes that was then exacerbated over the years. *Id.* Additionally, Donald's cocaine abuse led to congestive heart failure, retinopathy, and neuropathy. *Id.* Donald called Kloese and told Kloese that he did not want to die in hospice and explained "he was going to a drug house to take care of it." *Id.* at 22-23.

Kloese explained that Shawn was a very kind brother who protected her from the violence in the household. *Id.* at 23-24. While Kloese eventually lost regular contact with Shawn, Shawn touched base with Kim at least once or twice a year. *Id.* at 24. Shawn had become homeless, similar to his other brothers. *Id.* at 24-25. Shawn was drinking, smoking cigarettes, and doing drugs. *Id.* at 25.

Kim recognized that her life had turned out better than the lives of her brothers. *Id.* Nonetheless, Kim still suffers long-term impacts from her upbringing. *Id.* Kim testified that, "It has impacted my health greatly and a lot of depression. A lot of illness. I've actually struggled to the point of I've coded several times and I'm still

here though, still hanging on." *Id.* Kim testified she had also attempted suicide twice and suffers from anxiety issues when she hears loud noises. *Id.* at 26-27

The second witness called was Shawn Lynch's paternal uncle, James Lynch. RT 7/18/2012, 55-56. James Lynch testified that his father, Shawn Lynch's paternal grandfather, was "A very, very tough individual" who was very demanding. *Id.* at 57 James Lynch testified that punishment was usually done with belts, but also occasionally done with straps or hands. *Id.* While the punishment was with open hands when James Lynch was younger, punishment was inflicted with fists by the time James Lynch was in his early teens. *Id.* at 57-58. When belts were used, it was specifically the buckle of the belt that was employed for punishment. *Id.* at 58.

James said that Shawn's grandfather (James' and Shawn's father) was a "heavy drinker" whose behavior only became worse when he drank. *Id.* at 59. The grandfather also "beat" his wife "a lot." *Id.* at 62. When they were younger, James described Shawn's father as being "sadistic." *Id.* at 63. He said his brother would come up behind him and hit him in the middle of the back and kick him with boots. *Id.* James described Shawn's father as having been in a gang at the age of 12-13 years old and having been arrested numerous times. *Id.* at 64. James said that his brother went into the Marines to avoid being put in jail. *Id.* at 65.

After his brother got out of the Marines, James said that he thought his brother had turned out much like their father – heavy drinker, hard-nosed, and mean. *Id.* at 66-67 James described Rosalie as being a "little looney" in that she seemed to "relish" her children getting into trouble. *Id.* at 71. He said she also drank heavily. *Id.* James said his brother and Rosalie were in a "constant battle" and that, one time, he saw them engage in a fist fight. *Id.* at 70-71. He described Rosalie as a "pretty bad" mother. *Id.* at 72. James described Shawn as being a "very weak child" who seemed "pretty afraid" of his father. *Id.* at 80.

Clinical Psychologist Jolie Brams testified concerning her evaluation of Shawn's "history starting before his birth with his parents and his grandparents and working [her] way through his adult years to get an understanding of how these developmental factors impacting his functioning over time." *Id.* at 102. She said that she reviewed records of the police investigation in the case, previous testimony of witnesses, records of Shawn's many "psychological and psychiatric evaluations over the course of time," school records, and his family's medical records. *Id.* at 109-10. She also interviewed Shawn, Kloese, Shawn's brother, Jim, Kathy Keltz, Karin Hansen, and Shawn's uncle, Jim. *Id.* at 113-14.

Dr. Brams described Shawn's parents as being "remarkably violent and destructive and dysfunctional individuals who were totally ill equipped to parent

anything." *Id.* at 120-21. She described both sets of Shawn's grandparents as having families that were "really decimated by violence and alcoholism and mental health issues." *Id.* at 122. She said that Shawn and his siblings were raised in an atmosphere of "profound violence and neglect." *Id.* Brams said that "violence was the norm, violence between the parents," alcoholic rages, throwing people down stairs, hitting people in the head with pots, throwing boiling water. *Id.* at 124. She added that their children were not immune to the parents' rampages. *Id.* at 125. Brams said the children were the victims of physical abuse and emotional neglect. *Id.* at 128. According to Brams, their father would touch his wife's breast in front of the kids and he would appear in his underwear in front of them. *Id.* at 144. She described the impact that being raised in such a household would have on a child. *Id.* at 128-33. Because of the ways of his parents, their lack of providing contingent reinforcement, Brams described Shawn, the adult, as "staying away" from his family by being homeless and drifting. *Id.* at 132. She said that children who grow up as Shawn did have a lot of distrust and paranoid ideation – thinking that the world is a dangerous place. *Id.* at 133. She also said that when children experience what Shawn did that it can lead to sexual confusion and confusion about intimacy. *Id.* at 146. With children raised as Shawn was, who become adults, Brams said that she would expect the adult to have "difficulty with attachments, fears, being a loner, having anger management

difficulties, feeling passive, vulnerable, paranoid, anxious, having mental health difficulties, maybe even having some delusional issues like perceiving the world inaccurately." *Id.* at 138. Brams described that having parents who are alcoholic gave a child a "huge genetic contribution" to alcoholism and other substances. *Id.* at 150. As a result, Brams noted that Shawn developed a "very serious substance abuse problem." *Id.* at 152. She said that because of Shawn's "relatively low IQ.... with some obvious learning issues and the alcoholism and the violence in the family and the lack of concern, Mr. Lynch just never got those skills that he needed to move into the adult phase of life." *Id.* at 156. Brams went on in detail to describe Shawn's dysfunction. *Id.* at 156-74.

She summarized that while Shawn's upbringing did not "excuse him from the offense that occurred" – that "when you look at his development over the life span and you look at the poisonous nature of his early life and how he was never given the skills to continue and develop into a healthy functioning adult, at that period before the offense he was decompensating, he was using drugs, he did not have the skills, the support, the guidance, the ability to live a life that was functional and healthy and productive and that is the point that he ended up at the time prior to the offense." *Id.* at 174-175.

James Evans Aiken testified that he was the president of James E. Aiken and Associates, Inc. – a firm that dealt with prison and jail security. RT 7/23/2012, 12. He said that he reviewed Shawn's record to determine if, in his expert opinion, Shawn could "be adequately managed and maintained in a correctional environment for an extended period of time." *Id.* at 13-22. After reviewing the records, Aiken said that it was his conclusion that Shawn "could be adequately managed in a correctional institution for an extended period to include the remainder of his life without causing undue risk of harm to staff, inmates or the general public as long as he [was] in a high security setting." *Id.* at 22-26.

Dr. Gerald Altschuler, a hematologist, oncologist, and internist physician, testified that he was board certified in all three of those disciplines. *Id.* at 55. Altschuler testified concerning Shawn's hepatitis C and the Arizona Department of Corrections choices concerning treatment of inmates with that condition. *Id.* at 58.

The plea agreement and the sentencing minute entry related to Michael Sehwani was presented to jury – demonstrating the co-defendant's life sentence agreement. RT 7/24/2012, 14-15.

The defense later called retired Scottsdale Police detective Paul Arnold. RT 8/8/12, 40. Arnold testified that he was involved in the investigation of the homicide of James Panzarella. *Id.* at 41. As a part of that investigation, he conducted

a follow-up investigation of the use of Panzarella's credit cards at a Dino's restaurant. *Id.* Arnold showed two store employees, Amy Stevenson and Vincent Marchase, photographic lineups. *Id.* According to Arnold, both employees picked out Michael Sehwani's picture as being the person who used credit cards belonging to Panzarella. *Id.* at 42. Arnold also showed Marchase a lineup that contained Shawn's picture but Marchase did not identify Shawn. *Id.* at 43. As a part of his investigation, Arnold also went to a K-Mart where Panzarella's credit and debit cards were used. *Id.* at 43. He reviewed K-Mart's surveillance video tape and identified the person using the cards as appearing to be Michael Sehwani. *Id.* at 44.

Next, portions of Michael Sehwani's interview with the Scottsdale Police were read to the jury. *Id.* at 57-78. During that interview, Sehwani admitted to being present. *Id.* at 78-81.

Shawn did not allocute. *Id.* at 92-93.

ISSUES PRESENTED FOR REVIEW

1. Can a sentence of death stand where, as in this case, it was tainted by several instances of prosecutorial misconduct?

2. Under Arizona law, when a death sentence is overturned on appeal, any resentencing begins anew as if the original sentencing had not occurred. Here, the trial court limited the retrial to just the penalty phase of the sentencing. Did the court err?

3. Pursuant to *Simmons v. South Carolina*, 512 U.S. 154 (1994), a trial court must instruct the jury if parole is not available to a defendant. Parole was not available to Lynch because Arizona abolished parole in 1994. However, the trial court refused Lynch's request for a *Simmons* instruction. Did the court err?

4. The United States Supreme Court set forth a three stepped procedure when challenges to peremptory strikes are made pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986). Here, the trial court failed to conduct the third step in the procedure. Did the court err?

5. Defendants are entitled to an impartial jury which is properly constructed. Here, a juror who deliberated and returned the death verdict had extra-judicial information regarding the State's expert witness. This information came from the juror's prior working relationship with the witness. Did the trial court err when the trial court refused Lynch's motion to strike the juror?

6. Is Lynch is entitled to leniency?

7 Is Arizona's death penalty unconstitutional?

ARGUMENT 1

THE SENTENCE IN THIS CASE WAS TAINTED BY SEVERAL INSTANCES OF PROSECUTORIAL MISCONDUCT.

Standard of Review

When a defendant objects to an alleged act of prosecutorial misconduct, the issue is preserved; when a defendant fails to object, the court engages in fundamental error review. *State v. Roque*, 213 Ariz. 193, ¶ 154, 141 P.3d 368, ¶ 154 (2006). The court will reverse a conviction because of prosecutorial misconduct if misconduct is present and "a reasonable likelihood exists that [it] could have affected the jury's verdict, thereby denying defendant a fair trial." *State v. Anderson,* 210 Ariz. 327, ¶ 45, 111 P.3d 369, ¶ 45 (2005). Even if the alleged acts of misconduct do not individually warrant reversal, the court must determine whether the acts "contribute to a finding of persistent and pervasive misconduct." *Roque,* 213 Ariz. 193, ¶ 155, 141 P.3d 368, ¶ 155.

***Discussion*:**

This brief raises several instances and forms of misconduct. For clarity's sake, this brief will discuss the pertinent facts as each form of misconduct is evaluated.

1. The prosecutor improperly argued inferences and conclusions during opening statements.

Opening statements have a limited role and argument during opening statements is improper:

> Opening statement is counsel's opportunity to tell the jury what evidence they intend to introduce. Opening statement is not a time to argue the inferences and conclusions that may be drawn from evidence not yet admitted.

State v. Bible, 175 Ariz. 549, 602, 858 P.2d 1152, 1205 (1993) (internal citation omitted). In *Bible* the prosecutor had argued to the jury that the victim had been tortured without any direct evidence to support the claim. *Id.* This Court found the argument improper. *Id.* However, because the comment would have been permissible during closing arguments, this Court did not reverse. *Id.*

Here, the prosecutor repeatedly presented argument during opening statements. The trial court appropriately sustained objections to two instances. RT 7/17/2012, 98-99 (arguing childhood should not be considered as a mitigating factor), 106 (arguing the Defense was trying to improperly appeal to passions). Despite these sustained objections, the prosecutor continued to present argument during the opening statement. The argument largely focused on persuading the jury that little weight should be given to certain mitigating factors and expected evidence. *Id.* at 97-98 (arguing no weight should be given to traumatic childhood because medical records

would not be produced), 99 (arguing little weight should be given to traumatic childhood because of temporal proximity), 103-04 (arguing little weight should be given to Dr. Altschuler's testimony and Hepatitis C diagnosis as a mitigating factor). The prosecutor did not limit his argument to what was permissible. Instead, the prosecutor used opening statements as an opportunity to argue inferences and conclusions, in direct violation of this Court's direction in *Bible*.

2. The prosecutor repeatedly and improperly posed argumentative questions.

In *State v. Bolton* this Court recognized argumentative questions are a form of prosecutorial misconduct. 182 Ariz. 290, 307-08, 896 P.2d 830, 847-48 (1995). Upon objection, the trial court sustained the objection and instructed the State, "No more argumentative questions." *Id.* at 308, 848. This Court found the questions were argumentative, but ruled, "the misconduct was not so egregious that it permeated the entire trial and probably affected the outcome." *Id.*

The impropriety of such questions is well accepted amongst most jurisdictions and is interpreted to apply to questions which are argumentative, badgering, impertinent, or insulting. *See Boyle v. Million*, 201 F.3d 711, 717 (6th Cir. 2000) ("Badgering and interrupting a witness, name-calling, predicting that the defendant will lie on the stand, and stating before the jury that the defendant is in need of psychiatric help are tactics so deplorable as to define the term 'prosecutorial

misconduct.'"); *U.S. v. Drummond*, 481 F.2d 62, 62 (2d Cir. 1973); *see Zayre, Inc. v. Carswell*, 348 So.2d 45, 48 (Fla.App. 1977); *State v. Herndon*, 292 N.C. 424, 430, 233 S.E.2d 557, 561-61 (N.C. 1977); *State v. Daye*, 281 N.C. 592, 596, 189 S.E.2d 481, 483 (N.C. 1972); *State v. Gardner*, 127 Ohio App.3d 538, 541 (Ohio App. 1998); Joan C. Bohl, Extrajudical Attorney Speech and Pending Criminal Prosecutions: The Investigatory Commission Meets A.B.A. Model Rule 3.6, 44 U.Kan.L.Rev. 951, 958 (1996) ("The permissible form of questions put to witnesses is an obvious example. Attorneys may not lead witnesses on direct examination, may not badger witnesses, pose questions that have already been asked and answered, or pose questions that are simply argumentative."); *see also* discussion regarding "were they lying" questions, section 3, *infra*.

Here, the prosecutor, Juan Martinez, repeatedly asked questions which were argumentative; had been asked and answered; badgered, humiliated, and insulted witnesses; interrupted witnesses; and improperly commented upon testimony. The defense objected to a number of these instances below and the trial court sustained many of the objections. [1] *E.g.* RT 7/18/2012, 33 (asked and answered),

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[1] This section discusses the impropriety of many questions generally. Several of Mr. Martinez's questions implicate a more specific form of argumentative questions, "were they lying" questions, which is addressed separately. *See* Section 3, *infra*.

198 (argumentative and improper "were they lying" question), 199 (argumentative), 203 (asked and answered); RT 7/19/2012, 14 (interrupting witness), 20 (argumentative), 49 (interruption); RT 7/23/2012, 31-32 (argumentative), 38-39 (argumentative). The prosecutor's argumentative questioning was objected to on other occasions where the objection was overruled. RT 7/18/2012, 42, 191-92, 198; RT 7/23/2012, 126. On July 23, 2012, the improper questioning had become such a problem that the trial court admonished Mr. Martinez to change his tone, RT 7/23/2012, 39, and later took a recess after Mr. Martinez had again become argumentative, *id.* at 129.

3. The prosecutor improperly asked witnesses "were they lying" questions.

It is improper to ask questions which cause one witness to comment upon the veracity of another witness' testimony. *U.S. v. Sanchez*, 176 F.3d 1214, 1219-20 (9th Cir. 1999) (finding it improper to question defendant on veracity of another witness' statement and to have a different witness comment on the veracity of defendant's extra-judicial statements); *U.S. v. Sanchez-Lima*, 161 F.3d 545, 548-49 (9th Cir. 1998) (finding testimony that one agent believed a different agent had told the truth during a post-incident interview reversible error).

The Arizona Court of Appeals evaluated the question in a claim of fundamental error in *State v. Morales*, 198 Ariz. 372, ¶¶ 8-16, 10 P.3d 630, ¶¶ 8-16 (App. 2000).

In *Morales* the Court of Appeals noted the general consensus was that "were they lying" questions are "categorically improper." *Id.* at ¶ 10. The Court of Appeals noted the reasoning of other courts:

> For example, some courts have reasoned that such questions may well invade the jury's province to determine witness credibility; suggest only one explanation for inconsistent testimony and disregard other possible explanations, such as mistake, poor ability or opportunity to observe, or hazy recollection; produce answers that are not particularly helpful to the trier of fact; and be argumentative and encourage decision-making on an improper basis.

Id. at ¶ 12 (citations omitted). However, the Court of Appeals recognized some cases have carved out narrow exceptions to the categorical rule. *Id.* The court refused to set forth a blanket rule either permitting or precluding "were they lying" questions. *Id.* at ¶ 12. Rather, the court ruled there may be limited occasions when "were they lying" questions might be appropriate:

> For example, such questions may be appropriate when the only possible explanation for the inconsistent testimony is deceit or lying or when a defendant has opened the door by testifying about the veracity of other witnesses on direct examination.

Id. at ¶ 13.[2] This conclusion, however, has since been undercut.

First, some cases relied upon in *Morales* have been abandoned or modified. *Morales* cited to *Fisher v. State*, 128 Md.App 79, 736 A.2d 1125 (Md.App. 1999) for the proposition that "were they lying" questions "properly challenge the defendant's credibility." *Morales*, 198 Ariz. 372, ¶ 10, 10 P.3d 630, ¶ 10. *Fisher* has been completely abandoned in Maryland. In *Hunter v. State*, the Maryland Supreme Court squarely confronted *Fisher* and concluded *Fisher* had misconstrued prior Maryland jurisprudence. *Hunter*, 397 Md. 580, 590-91, 594, 919 A.2d 63, 68-69, 71 (Md. 2007). The Maryland Supreme Court found "were they lying" questions "impermissible as a matter of law." The Court found the questions improper because such questions encroached on the province of the jury, required the witness to resolve contested facts, were argumentative, and were unfair. *Id.* at 595-96, 71-72. In

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[2] The Court of Appeals further noted that any misconduct was likely not fundamental error. 198 Ariz. 372, ¶ 15, 10 P.3d 630, ¶ 15 ("'Were they lying' questions alone will rarely amount to fundamental error."). Because the defendant had attributed the inconsistencies to mistakes or misunderstandings during testimony, the error was not fundamental. *Id.*

Hunter, Maryland joined the majority of states which prohibit questions which require a witness to comment on the veracity of other witnesses.

The Arizona Court of Appeals also relied upon *State v. Pilot*, 595 N.W.2d 511 (Minn. 1999), when concluding "were they lying" questions might be appropriate "when the only possible explanation for the inconsistent testimony is deceit or lying or when a defendant has opened the door by testifying the veracity of other witnesses on direct examination. *Morales*, 198 Ariz. 372, ¶ 13, 10 P.3d 630, ¶ 13. However, the Minnesota Supreme Court has modified its position on "were they lying" questions. In *Pilot* the Minnesota Supreme Court decided there might be a number of circumstances when "were they lying" questions are proper, including when a defendant has placed the credibility of State's witnesses at issue, or to "clarif[y] a particular line of testimony, evaluat[e] the credibility of a witness claiming that everyone but the witness lied or ... the witness 'flatly denies the occurrence of events.'" *Pilot*, 595 N.W.2d at 518. However, the breadth of *Pilot* has been narrowed. In *State v. Morton* the Minnesota Supreme Court again reviewed the propriety of "were they lying" questions. 701 N.W.2d 225 (Minn. 2005). In *Morton* the Minnesota Supreme Court only evaluated the exception of whether the defendant held "the issue of the credibility of the State's witnesses in central focus." *Id.* at 233-235. This limitation was expressly noted by the Minnesota Supreme Court in *State v.*

Dobbins, 725 N.W.2d 492, 511 fn.4 (Minn. 2006) (noting *Morton* modified *Pilot*). Post-modification, "were they lying" questions can be asked "only if 'the defendant "holds the issue of the credibility of the state's witnesses in central focus."'" *Id.* at 511. Time has changed the scope of the exception upon which the Court of Appeals relied.

Six years after the Arizona Court of Appeals decided *Morales*, the Colorado Supreme Court conducted a lengthy evaluation of questions which required a witness to comment on the veracity of other witnesses. *Liggett v. People*, 135 P.3d 725, 729-33 (Colo. 2006) (collecting cases). Evaluating how other jurisdictions have handled the issue, the Colorado Supreme Court noted, "[t]he majority of ... jurisdictions has expressed the general rule that asking a defendant or witness to comment on the veracity of another witness is improper." *Id.* at 729. The reasons relied upon by this majority of jurisdictions have included: "they invade the province of the jury, lack probative value, distort the government's burden of proof, create a 'no win' situation for the witness, and are argumentative." *Id.* Specifically identifying *Morales*, the Colorado Supreme Court noted, "A minority of courts have also taken the approach that such questions are generally improper, but have declined to adopt a bright-line rule." *Id.* at 730. In *Liggett*, the Colorado Court of Appeals had followed *Morales*. *Id.* (citing *People v. Liggett*, 114 P.3d 85 (Colo.App. 2005)). The Colorado Supreme

Court expressly rejected *Morales* and the minority approach and adopted the majority rule. *Id.*

Liggett is just one of a number of cases which have rejected the minority approach since *Morales* was decided. *See State v. Duran*, 140 N.M. 94, ¶ 21, 140 P.3d 515, ¶ 21 (N.M. 2006); *State v. Graves*, 668 N.W.2d 860, 873-74 (Iowa 2003); *State v. Singh*, 259 Conn. 693, 712, 793 A.2d 226, 239 (Conn. 2002). Each of these cases cited *Morales* and rejected the reasoning contained therein.

The tactic of asking these types of questions is also unethical. The Iowa Supreme Court explained:

> We also think the use of this tactic-asking the defendant whether another witness is lying-is incompatible with the duties of a prosecutor. Unfairly questioning the defendant simply to make the defendant look bad in front of the jury regardless of the answer given is not consistent with the prosecutor's primary obligation to seek justice, not simply a conviction. Nor is such questioning consistent with the prosecutor's duty to the defendant to ensure a fair trial, including a verdict that rests on the evidence and not on passion or prejudice.

State v. Graves, 668 N.W.2d 860, 873 (Iowa 2003); *accord State v. Casteneda-Perez*, 61 Wash.App. 354, 363, 810 P.2d 74, 79 (Wash.App. 1991) ("It is contrary to the duty of prosecutors, which is to seek convictions based only on probative evidence and sound reason.").

Throughout the prosecutor's cross-examination of Dr. Jolie Brams, the prosecutor consistently attacked Dr. Brams, accused Dr. Brams of vouching for witnesses, and expressly asked Dr. Brams to comment on the truthfulness of witnesses. The prosecutor first accused Dr. Brams of vouching for a witness in a different case, indicating such conduct would be improper. RT 7/18/2012, 196-97. The prosecutor, however, then asked Dr. Brams to comment on the veracity of James Lynch. *Id.* at 197-198. This improper question was reiterated twice until Brams could clarify that it was not her role to comment on the veracity of witnesses. *Id.* at 198-199. The prosecutor shifted to a different case to again accuse Brams of vouching for witnesses. *Id.* at 200-203. And again the prosecutor shifted back to the present case and accused Dr. Brams of commenting on the veracity of witnesses. *Id.* at 204. This pattern was again repeated the next day when the prosecutor asked Dr. Brams to comment on Kimberly Roon's truthfulness. RT 7/19/2012 (Fraley), 69-70.

Moreover, the record reveals Mr. Martinez had the precise intent which has been criticized in cases nationally. The prosecutor made clear he understood it was improper for witnesses to vouch for other witnesses. This was done through a systematic misconstruction of Dr. Brams's testimony in other cases. *See* RT 7/18/2012, 189-93. Then, when asking Dr. Brams to comment on James Lynch's veracity, the prosecutor argued:

> If that were the hypothetical you would say he's not to be believed, right, because you can vouch for people?

RT 7/18/2012, 198. This single argument makes clear the prosecutor was fully aware the question was improper but asked the question as a means to demean and degrade the witness. The "question" is the precise example addressed by *State v. Graves*, 668 N.W.2d 860, 873 (Iowa 2003). The question was posed "simply to make the [witness] look bad in front of the jury regardless of the answer given." *See id.* Each question which required Dr. Brams to comment on the testimony of other witnesses or which falsely accused Dr. Brams of vouching for different witnesses in different cases and different jurisdictions was improper. These lines of attack were inconsistent "with the prosecutor's primary obligation to seek justice, not simply a conviction" and "the prosecutor's duty to the defendant to ensure a fair trial, including a verdict that rests on the evidence and not on passion or prejudice. *See id.* This Court should embrace the approach used nationally and declare "were they lying" questions entirely impermissible. Further, because Mr. Martinez sought to attack Dr. Brams' testimony largely through these improper questions, the verdict reached in this case cannot be relied upon and should be reversed.

4. The State improperly advanced arguments through speaking objections.

While Arizona Courts have not had the opportunity to evaluate speaking objections in the context of prosecutorial misconduct, other jurisdictions have found the tactical use of speaking objections problematic. The California Court of Appeals reviewed prosecutorial misconduct in the context of speaking objections in *People v. Pitts*, 223 Cal.App.3d 606, 722-33, 273 Cal.Rptr. 757, 825-30 (Cal.App. 1990) (superseded by statute on other grounds as stated in *People v. Levesque*, 35 Cal.App.4th 530, 41 Cal.Rptr.2d 439 (Cal.App. 1995)). The specific complaint in *Pitts* was that the prosecutor used speaking objections to place information before the jury that was not admitted into evidence. *Id.* at 722, 825. The Court noted:

> It is settled that "the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." It is improper for a prosecutor to present potentially prejudicial "evidence" to a jury in the form of argument.

Id. (internal citations omitted). Weighing all the instances of misconduct, including the speaking objections, the California Court of Appeals reversed the convictions. *Id.* at 816, 870.

The Hawaii Supreme Court considered speaking objections, more generally, as a form of prosecutorial misconduct in *State v. Soares*, 72 Haw. 278, 283, 815 P.2d

428, 430-31 (Haw. 1991). In *Soares* the Court evaluated "numerous 'speaking objections'" as instances which contributed to the cumulative weight of the prosecutorial misconduct claim. *Id.* at 283, 431. In light of the "atmosphere of bias and prejudice" that had been created, the Court reversed the conviction and remanded the case for a new trial. *Id. Soares* was relied upon by the Arkansas Supreme Court two years later in *Dillon v. State*, 311 Ark. 529, 539-40, 844 S.W.2d 944, 948-49 (Ark. 1993).

Here, the prosecutor tactically sought to create an environment in which the prosecutor could make speaking objections but the Defense could not. The prosecutor used speaking objections to place himself and his arguments in a better light. The State used speaking arguments before the jury to argue that Dr. Brams was "obviously vested," RT 7/19/2012, 43, and that Dr. Altschuler was "a jack of all trades," RT 7/23/2012, 151. The State used speaking objections before the jury to paint itself as more willing to introduce evidence (and thereby imply the Defense was trying to withhold evidence). RT 7/24/2012, 47-48 (repeatedly arguing before the jury that a transcript should be introduced). The prosecutor's overall approach was to name the objection and then argue, before the jury, the reason behind the objection. RT 7/23/2012, 89-90 (arguing why he believed an exhibit was cumulative); RT 7/24/2012, 53-547 (arguing why recollection was irrelevant). Only once could the

trial court's conduct have been seen as inviting argument, but even this conclusion is specious in light of the context. RT 7/23/2012, 90 (trial court asking "I'm sorry?" after prosecutor's objection and prosecutor taking opportunity to present argument before the jury). However, the prosecutor found similar conduct on the part of the Defense problematic. The prosecutor twice objected, once before the jury, to Defense speaking objections. RT 7/23/2012, 130 (during break); RT 7/26/2012, 116 (before jury). The prosecutor tactically sought to create an environment in which the prosecution could use speaking objections to present argument to the jury but the Defense could not. The prosecutor's tactics were used throughout testimony and permeated the atmosphere of trial.

5. The State improperly attacked the Defense expert during cross-examination and in closing argument.

Underlying Facts:

Throughout trial the prosecutor sought to denigrate two experts: Dr. Jolie Brams and Dr. Gerald Altschuler. The attacks began in opening statements. While commenting on the mitigation evidence related to Lynch's Hepatitis C diagnosis, the State argued:

> They also tell you that, well, you know, he's got this medical condition and Dr. Gerald Altschuler is going to testify and he's going to tell you about it. Dr. Gerald Altschuler, according to them, has this Child-Pugh

> standard, this Child-Pugh standard that comes from Wikipedia. And the other thing that they will tell you, as something to support that, he has a journal, a medical journal that sort of supports his position. It's the Singapore Medical Journal from 2003. That's the person that came in here to tell you, according to them, that he has a life expectancy of two years.
>
> The problem with that, when he created that report, was that he based it on information that was approximately six months to a year old, and given that information, he said that from that time he only had a two year life expectancy. But the two years have come and gone. And that's the thing that Gerald Altschuler misses. That's the thing, he is using his Wikipedia -- he's using this subjective standard and says he's going to not be around in two years.

RT 7/17/2012, 103-04. The defense objected that the prosecutor was misstating the evidence because the Child-Pugh standard was not from Wikipedia and is not a subjective standard. *Id.* at 104. Rather than rule on the objection, the trial court reiterated, "[t]he jury has been told that counsel's statement is not evidence" and "[t]hat opening statements are to tell [the jury] what [attorneys] expect the evidence will show." *Id.* The State continued with its argument by explaining to the jury that the report would reference Wikipedia. *Id.*

The attacks against Dr. Jolie Brams began during her testimony on July 18, 2012. During cross-examination the following interaction occurred:

Q. With regard to that, being an expert on recollected memories, isn't that really just vouching for what somebody is saying?

In this case, isn't -- aren't you really vouching for what the client was saying, I was a juvenile. Isn't that what you're just really doing? Because you're saying this person -- the other person is not to be believed?

A. No. In the Gomez Gomez case, I was not vouching for anyone. I was stating -- and this court does not know the history of this, it's a drug issue --

Q. We already read it, right? You read it to us, right?

A. You don't know the context in which the -- of the matter. I read to you, honestly what the paragraph was and I don't disagree with it.

RT 7/18/2012, 196-97 The prosecutor then transitioned this vouching argument to Lynch's case:

Q. Now, with regard to this particular case, today as a matter of fact, we had an individual who testified about how the Lynches were treated and I'm talking about James Lynch and I'm talking about Shawn Lynch and this person was asked, well, how long ago was that? Well, they must have been about four years old. And how old is the defendant today?

A. I think he's 53. Maybe –

Q. If he's 53 now, when he was four years old that would make it 49 years ago, would you agree?

A. Of course.

> Q. And what this individual indicated was, well, when Riley the father, well, when he went -- when there was a problem, and these kids were fighting, all he did was take them away. That's what he said.
>
> And he was asked by the defense attorney, is there anything that makes that stand out in your mind? Anything that makes that something that stands out in your mind now 49 years year later? He didn't use the word 49 but he said that makes it stand out, he said, no, it's just something that I remember.
>
> If that were the hypothetical you would say he's not to be believed, right, because you can vouch for people?

Id. at 197-98. The defense objected and the court sustained the objection. *Id.* at 198.

Later in the cross-examination, the prosecutor harkened back to the Gomez Gomez case previously discussed:

> Q. Well, you did -- in the other case you did say that Mr. Braulio Martinez was mistaken though, didn't you?

Id. at 203. The defense objected on the grounds that this was asked and answered, which the trial court sustained. *Id.* After the objection was sustained, the prosecutor attacked on the exact same grounds:

> Q. BY MR. MARTINEZ: Well, this is the same sort of thing here, isn't it? On this particular case you took a look at what somebody said and you reached a conclusion that perhaps they were mistaken or whatever term you want to use, right?

A. I can't honestly, with all due respect, Mr. Martinez, answer a question that you are coming up with what my answer is. I can't honestly answer that because the issues about children being interviewed have 25 years of behavioral research behind them about children's suggestibility.

My testimony was that the interview may have misled the child's statements. That's all that really in a nutshell the testimony was about.

Id. at 204.

Cross-examination of Dr. Brams went to the next day, July 19, 2012. RT 7/19/2012 (Fraley); RT 7/19/2012 (LeMoine). While talking about the prosecutor's interview with Brams, the prosecutor began asking about two pages that he demanded at the beginning of the interview. RT 7/19/2012 (LeMoine), 42-49. When initially asked to turn over the pages, Dr. Brams refused. *Id.* at 43-44. Dr. Brams explained why she initially refused in the following interaction:

Q. Yet you did not want to provide me with a listing of the documents that you had, right?

A. Well, I probably should have done it, and I was trying to be conservative with the time we spent together. I knew you already had the documents. I may have sounded somewhat harsh. It was -- I yield -- the documents I have reviewed, you already aware of what I have reviewed.

Q. No, that's actually not true because at that point, ma'am, I didn't have those two pages that ultimately

slipped out of that black binder, so you didn't know what documents I had reviewed, did you?

A. To be honest you with [sic], I didn't even know the two pages were in my binder so neither one of us knew that.

Q. And so what you're saying is that had you known that those two pages were in your binder, you would have removed them before the interview?

A. That's a terrible thing to even imply. What I –

Q. You said –

Id. at 48-49. The defense objected, again on the grounds that the prosecutor was not letting the witness finish. *Id.* at 49. Again, the court allowed Dr. Brams to finish her answer. *Id.*

Dr. Gerald Altschuler was called on July 23, 2012. RT 7/23/2012, 54. Eventually the cross-examination turned to chemotherapy issues. *Id.* at 150. The prosecutor began asking Dr. Altschuler about the process a patient and Dr. Altschuler go through when chemotherapy is prescribed. *Id.* at 150-151. The defense objected on the grounds that the chemotherapy process was irrelevant. *Id.* at 151. The prosecutor took this as an opportunity to argue, before the jury, "He is a jack of all trades and not a master of this." *Id.* The prosecutor had no further explanation for how this was relevant. *Id.* The court permitted the inquiry nonetheless. *Id.*

During closing argument, the prosecutor spent a substantial period of time attacking Dr. Jolie Brams. RT 8/9/2012, 66-74. The prosecutor repeatedly accused Dr. Brams of wrongdoing. *E.g. Id.* at 66 (accusing Dr. Brams of bias), 67 (accusing Dr. Brams of insufficient investigation), 68 (accusing Dr. Brams of bias and following improper procedures), 68-69 (accusing Dr. Brams of refusing to turn over documents and attempting to slant the truth). The prosecutor carefully tied these accusations of wrongdoing on Dr. Brams part to the Defense attorneys:

> They [the Defense attorneys] have a guide for you that's going to take you back. Her name is Jolie Brams.

Id. at 66;

> That's the person that they chose to take you back to his childhood.

Id. at 68;

> That's the person that they brought in to you so that you can then take a look at this mitigating circumstance about his childhood, all the things they said about his childhood.

Id. at 69.

Discussion:

In *State v. Comer*, 165 Ariz. 413, 799 P.2d 333 (1990), this Court dealt with a similar situation. The prosecutor in *Comer* attacked the defendant by resorting to name-calling, "characterizing appellant as a 'monster', as 'filth', and the

'reincarnation of the devil on earth' ...." *Id.* at 426, 346. This Court noted that wide latitude is given to attorneys during closing arguments, "however, counsel may not make arguments which appeal to the passions and fears of the jury." *Id.* (quoting *In re Zawada*, 208 Ariz. 232, ¶ 14, 92 P.3d 862, ¶ 14 (2004)). This Court concluded "the prosecutor's name-calling went beyond arguing the vicious nature of appellant's acts and was an appeal to the jury's passions and prejudice." *Id.* at 427, 347. This Court found the error harmless, however, in light of the weight of the evidence. *Id.*

State v. Roque, 213 Ariz. 193, 141 P.3d 368 (2006), dealt more clearly with attacks to an expert witness. In *Roque* the prosecutor attempted to ridicule an expert witness's publications and other qualifications. *Id.* at ¶ 160. The prosecutor asked if the expert witness's school "was started by a bunch of teachers offering classes to the people in New York on things like acupuncture and that sort of thing." *Id.* This Court noted, "a prosecutor cannot attack the expert with non-evidence, using irrelevant, insulting cross-examination and baseless argument designed to mislead the jury ...." *Id.* at 161. While this Court found the improper questioning was not, independently, reversible, the instance contributed to the analysis of cumulative misconduct. *Id.*

Here, the prosecutor attacked the testimony of the expert witnesses through denigration and illogical attack. The prosecutor misstated the Child-Pugh test during opening statements in an attempt to attack Dr. Altschuler's credibility. Then during

cross-examination the prosecutor used an objection as an opportunity to attach a catchy insult to Dr. Altschuler.

The attacks lodged against Dr. Brams went even further. The prosecutor continually mischaracterized Dr. Brams' prior testimony in different cases and accused Dr. Brams of "vouching" for Lynch and witnesses and withholding evidence.

6. The prosecutor improperly appealed to the fears of the jury.

Prosecutors "may not make arguments which appeal to the passions and fears of the jury." *State v. Comer*, 165 Ariz. 413, 426, 799 P.2d 333, 346 (1990).

Here, the prosecutor appealed to the fears of the jury during his cross-examination of James Aiken. RT 7/23/2012, 46-48. The prosecutor referenced an escape which had nothing to do with Lynch's case. *Id.* at 46-47. The argument did not attack the underlying reasoning or premises of Aiken's conclusion. The prosecution offered no reason to believe the individuals who escaped were in a similar position to Lynch. The prosecutor used a high-profile case to imply Lynch would be able to escape from prison and kill someone else without any support or justification for the position. The prosecutor simply used the high-profile case to appeal to the passions and fears of the jury. Such an appeal was improper.

The prosecutor also theorized Lynch could possibly "stick or prick, with a sharp object, one of the corrections officers." *Id.* at 47 When Aiken responded the

likelihood would be miniscule, the prosecutor asked, "do you think that that would be comfort to the person who got stuck by a needle that Shawn Lynch had used, do you think that would be comfort to them?" *Id.* at 48. The Defense objected on relevance grounds and the trial court overruled the objection. *Id.* Again, the prosecutor sought to present argument through biases and prejudices. The prosecutor appealed to the desire to protect correctional officers when there was no evidence to support the prosecutor's assertion that Lynch would "stick or prick" an officer. Further, what might comfort a correctional officer was not relevant to the appropriate sentence.

7. The prosecutor repeatedly misstated the evidence.

It is improper for a prosecutor to misstate the evidence and an intentional misstatement is "a serious breach of the prosecutor's duty." *State v. Cannon*, 148 Ariz. 72, 77, 713 P.2d 273, 278 (1985). Other jurisdictions have expressly recognized misstatements of evidence as a form of prosecutorial misconduct. *E.g. United States Atcheson*, 94 F.3d 1237, 1244 (1996) (addressing argument outside the record as prosecutorial misconduct); *State v. Mayhorn*, 720 N.W.2d 776, 788 (Minn. 2006) ("A prosecutor commits misconduct by intentionally misstating evidence.").

Here, the trial court correctly ruled the prosecutor misstated the evidence on three separate occasions. The trial court refused to admit an exhibit because the prosecutor attempted to present it out of context. RT 7/19/2012 (LeMoine), 3.

Notably, the prosecutor had already asked a number of questions premised upon this misstatement of context. RT 7/19/2012 (Fraley), 39-40. The prosecutor also misstated the evidence when the prosecutor mischaracterized Dr. Bram's testimony in a prior case. *Id.* at 41-42. Finally, the prosecutor misstated the evidence when the prosecutor argued the renting of pornographic movies demonstrated heinousness or depravity. RT 8/9/2012, 65-66.[3] In each instance the trial court sustained a timely objection from the Defense. RT 7/19/2012 (LeMoine), 3; RT 7/19/2012 (Fraley), 42; RT 8/9/2012, 66

8. The State lodged improper *ad hominem* attacks against Defense counsel.

Underlying Facts:

In the opening statement and throughout closing argument the prosecutor elected to advance his position through *ad hominem* attacks rather than logical arguments. The prosecutor focused on the defense attorneys and sought to discredit the defense attorneys rather than respond solely to the arguments. This was done largely by creating a theme which accused the defense attorneys of presenting false information.

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[3] This argument was premised upon testimony from Detective Kevin Furia that Lynch had ordered a number of pornographic movies while at the Best Western after the murder. RT 8/6/2012, 49-54. This testimony was allowed over defense objection. *Id.*

Discussing the mitigation related to a disparity in Mr. Lynch's role and the role of his co-defendant, Michael Sehwani, the prosecutor argued in opening statements:

> And you know the reason I point it out is because the myth has become the truth. Perhaps if you talked to William Dawes and his ancestors or the people that came after him, guess what, they would tell you a different story, but nobody knows -- or hardly anybody knows about William Dawes, because the myth has now become the truth, and that's what you have here with regard to Mr. Sehwani and his participation. The myth has now become the truth.

RT 7/17/2012, 95-96. This argument was referenced throughout the opening statement. *Id.* at 97 (reference to William Dawes); *Id.* at 98 ("All you're going to get is people saying it, but like with Paul Revere, the myth becomes the truth.").

The prosecutor also referenced the Defense when the prosecutor argued, "Then they want to pull at your heart strings by talking to you about...." RT 7/17/2012, 106. The defense objected to this argument and the trial court sustained the objection and struck the argument. *Id.*

The theme of a myth was expanded in closing arguments. During closing arguments the very first words from the prosecutor were:

> Good afternoon. The defendant's presentation through the evidentiary portion as well as the closing argument has been to take a myth, which is an unfounded belief, to take a myth and present it to you as fact without regard to the sunlight of the truth. What he has done is he has invited you into this mythical world, if you will, fanciful, darker

> world, in which he has presented certain items to you, certain evidence to you, perhaps something about his past, perhaps something about his future.
>
> And he has asked you to take a look at all of that. And he said to you, take a look at this, but do not bring it out into the sunlight. Do not put it out so that others can examine it. Just take a look at in here. And we will give these items a different name, these facts that we are presenting to you. And we will call those mitigating factors or mitigating circumstances.

RT 8/9/2012, 47 Allusions to this notion of a "fantasy land" continued throughout the State's argument:

> But when they discussed that [who cut Panzarella's throat] with you, they don't talk to you about the DNA evidence, because in this fanciful world that they have, the DNA evidence is not something that will help them.

Id. at 48;

> And no one can debate that [DNA evidence did not show up on Sehwani's shirt], even if they want to take you to a fanciful world.

Id. at 51;

> That's just the way it works [DNA would have been on Sehwani's shirt]. You can go to a fanciful area. You can go wherever you want. You may want to try to change that.

Id. at 53;

> You see, with regard to this [who cut Panzarella's throat] you just have to remember what else is going on. You have to bring it to light. You can't just sit back in dispensable darkness and say, well, I say this, but you can't look at it from this other perspective.

Id. at 55;

> So when they want you to compare [the roles of Mr. Sehwani and Mr. Lynch], if you bring it up to the light of day from this mythical world, there's no comparison.

Id. at 61-62;

> The other thing that they tell you in this mythical land of theirs that they want you to come to is that, well -- and this was in the jury instructions -- was that the defendant, poor guy, you know, at the time that he did this -- because now in order for you to consider this factor, you have to admit he did it. You know he did the cutting. At the time that he did this cutting, he failed to appreciate the wrongfulness of his conduct and to conform his conduct to the norms of law.

Id. at 62;

> This is the upside down, where up is down and left is right world, where they want to present these to you and say this is a mitigating factor without bringing it out to the sunlight.

Id. at 63;

> He has a drug abuse problem. How upside down is that logic in this mythical, horrific upside down world they are asking you to walk into when taking drugs is not a good thing?

Id. at 64;

> And, you know, they don't want you to just go back by yourself in this horrifically mythical world of theirs, this fantastical place.
>
> They have a guide for you that's going to take you back. Her name is Jolie Brams.

Id. at 66;

> She's not taking you directly back. She's taking you by a side road. She's taking you to places she wants you to only see. Not reality, but this fantastical colored world that she wants to taint for you.

Id. at 67;

> We now looked at what happened to him in the past, even though we didn't prove it, when you bring it out to the light in this mythical world of ours, but, you know, why don't we look to the future?

Id. at 74-75;

> But what do they do? They present it [Lynch's Hepatitis C] to you anyway, because in this fanciful world of theirs, that's a mitigating factor.

Id. at 77;

> So what do we have then since you're going to have to go back there and compare that to these supposed mitigating circumstances from the never-land that they want you to consider?

Id. at 82.

> The prosecutor also spent a substantial period of time attacking Dr. Jolie Brams during closing argument. *Id.* at 66-74. During the argument the prosecutor repeatedly accused Dr. Brams of wrongdoing. *E.g. Id.* at 66 (accusing Dr. Brams of bias), 67 (accusing Dr. Brams of insufficient investigation), 68 (accusing Dr. Brams of bias and following improper procedures), 68-69 (accusing Dr. Brams of refusing to turn over documents and attempting to slant the truth). The prosecutor carefully tied Dr. Brams to the Defense team and his accusation that the Defense was telling a story:
>
> They [the Defense attorneys] have a guide for you that's going to take you back. Her name is Jolie Brams.

Id. at 66;

> That's the person that they chose to take you back to his childhood.

Id. at 68;

> That's the person that they brought in to you so that you can then take a look at this mitigating circumstance about his childhood, all the things they said about his childhood.

Id. at 69.

The prosecutor further accused the defense team of wrongdoing apart from his references to a fantasy land. Discussing DNA the prosecutor accused the Defense of asking the jury to speculate in violation of the jury's instructions:

> It [the DNA evidence] is something that you perhaps will not consider when you are asked to speculate, as they put it or try to determine who was the person who did the cutting.

Id.

Discussion:

"A prosecutor has wide latitude in presenting arguments to the jury." *State v. Morris,* 215 Ariz. 430, ¶58, 160 P.3d 203, 216 (2007). However, it is improper to "imply unethical conduct on the part of an expert witness" in the absence of evidentiary support. *State v. Velazquez,* 216 Ariz. 300, ¶ 48, 166 P.3d 91 (2007). In the same vein, it is misconduct to impugn the integrity or honesty of opposing counsel. *State v. Hughes*, 193 Ariz. 72, ¶ 59, 969 P.2d 1184, ¶ 59 (1998); *State v. Newell,* 212 Ariz. 389, ¶ 66, 132 Ariz. 833 (2006); *see also U.S. v. Sanchez*, 176 F.3d 1214, 1225 (9th Cir. 1999) (prosecutor commits misconduct when denigrating the defense as a sham); *Carter v. State*, 356 So.2d 67 (Fla. Dist. Ct. App. 1978) (prosecutor referred to defense counsel as a "mouthpiece"); *People v. Weller*, 258 N.E.2d 806, 810 (Ill. App. Ct. 1970) (stating defense counsel could "qualify as an SS Trooper"); *State v. Lundbom*, 96 Or. App. 458, 773 P.2d 11 (1989) (referring to defense counsel as "pimp" and "hired gun"); *Commonwealth v. Long*, 392 A.2d 810, 813 (Pa. Super. Ct. 1978) (prosecutor referred to defense counsel as a "not guilty machine"); *Commonwealth v. Sargent*, 385 A.2d 484 (Pa. Super. Ct. 1978) (reference

to fact that defendant had a "paid attorney" hired to "acquit"); *Anderson v. State*, 525 S.W.2d 20, 22-23 (Tx. App. 1975) (defense attorney "wants to pull the wool over your eyes", "won't argue the law, and he won't argue the facts; all he will do is get up here and lie to you"). Most applicable to this case, it is improper for a prosecutor to attack Defense counsel by accusing counsel, or a witness for that matter, of concocting a falsehood. *See e.g. Thornton v. State*, 852 So.2d 911, 913-15 (Fla.App. 2003) (reversing conviction where prosecutor accused defense attorney of scripting a story); *People v. Vera*, 94 A.D.2d 728, 730, 462 N.Y.S.2d 467, 469 (N.Y Supreme Ct. 1983) ("While such questioning [of delay in presenting alibi to police] is permissible under certain circumstances ... it should not be accompanied by the improper characterization of the witness' testimony as a 'story' "); *McCarty v. State*, 765 P.2d 1215, 1220-21 (Okla.Cr.App. 1988) ("Mr. Macy [the prosecutor] improperly attacked the credibility of defense counsel by accusing him of 'making up a story.'"). Such arguments "impugn[] the integrity or honesty of opposing counsel." *See Hughes*, 193 Ariz. 72, ¶ 59, 969 P.2d 1184, ¶ 59.

Each of these cases disapproved of prosecutorial arguments that the Defense was, in effect, engaging in some sort of improper or unsavory conduct. As such, the arguments became an attack upon the character of the Defense counsel, rather than an argument on the merits of a case. These arguments are appropriately characterized as

ad hominem attacks (*see http://en.wikipedia.org/wiki/Ad_hominem*), or more narrowly construed as "Poisoning the Well" attacks (*see http://en.wikipedia.org/wiki/Poisoning_the_well*). Thus, the principle of these cases is that *ad hominem* attacks are impermissible and should not be tolerated.

Ad hominem attacks focus the attention of the jury not on reason or logic, but on a distaste of a certain person. The Defense attorneys were doing their jobs in representing Mr. Lynch and should remain free from ridicule based only upon the fact that they appropriately represented their client. Moreover, Mr. Lynch deserves a verdict based upon evidence, reason, and logic, not upon improper attacks against his attorneys. Each argument above was designed to discredit the attorneys and accuse the attorneys, as well as witnesses, of improper conduct. Because these instances of misconduct undermine the entire purpose of the justice system—to obtain verdicts based on reason and evidence—and demonstrate a complete departure from the role of the prosecutor to strike hard but fair blows, this misconduct, independently, should be given sufficient weight to justify a new trial.

Here, the repeated references to a "myth" or a "fantasy land" were accusations of misconduct on the part of the Defense. The prosecutor advanced the theory that the Defense was misrepresenting the truth or lying to the jury. Such an attack does not address the Defense argument upon the grounds of reason or logic. Rather, the

prosecutor attacked the integrity of the people making the argument. Such an argument involves an additional concern. A prosecutor who accuses Defense attorneys of taking jurors to a "fantasy land" invites the jury to determine a case upon the credibility of the attorneys. A determination upon the credibility of the attorneys inherently involves a consideration of the competing roles of these attorneys—the prosecutor who represents the State as opposed to the Defense attorneys who represent the accused. This carries the same concerns as in vouching cases. *State v. Leon*, 190 Ariz. 159, 163, 945 P.2d 1290, 1294 (1997) ("[T]he prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence."). The attacks were made even more egregious in light of the prosecutor's attack upon the Defense attorneys outside the "fantasy land" references. Aside from simply accusing the Defense attorneys of lying to the jury, the prosecutor also accused the Defense attorneys of tugging at the jurors' heart strings and asking the jury to speculate. In effect, the prosecution argued to the jury that the Defense was violating instructions regarding appealing to passions and speculation. The accusations of wrongdoing sought to discredit the attorneys, not the arguments. Accordingly, this Court should vacate the death sentence in this case.

9. The prosecutor improperly vouched during closing arguments.

Vouching is improper conduct for a prosecutor. *State v. Bible*, 175 Ariz. 549, 600, 858 P.2d 1152, 1203 (1993). "Two forms of impermissible prosecutorial vouching exist: (1) when the prosecutor places the prestige of the government behind its witness, and (2) where the prosecutor suggests that information not presented to the jury supports the witness's testimony." *Id.* at 601, 1204.

a. The State placed the weight of the government behind the credibility of its position.

Here, the misconduct largely consisted of the prosecutor placing the weight of the government behind the credibility of its position. The first instance occurred just moments into closing arguments when the prosecutor presented an assurance to the jury:

> And one of the areas that they talked about during the trial and they emphasized in closing was this issue about what happened back on that Sunday 2001 when this defendant -- and he did -- slash [JP]'s throat.

RT 8/9/2012, 48. Whether Lynch was the person who had actually done the act which killed the victim was a point of dispute. By assuring the jury "and he did", the prosecutor used the weight of his position, indeed his own credibility with the jury, as a reason to disregard a mitigating circumstance. Such conduct is particularly problematic given the nature of the proceeding. This jury was not faced with deciding

guilt or aggravation. Rather, the jury merely heard a perfunctory version of the case to provide context for the penalty decision. Moreover, the prosecutor's assurance contradicted the factual findings made by the previous jury. Only the first jury was tasked with deciding *Enmund/Tison*[4] factors. Only eight jurors believed Lynch actually killed the victim. I. 310. Only one additional juror believed Lynch even intended a killing to occur. *Id.* Lynch was found death eligible because Lynch was a major participant in the underlying felony and acted with reckless indifference to human life. *Id.* The prosecutor assured the jury Lynch had actually killed the victim in this case when he had never convinced a unanimous jury on this point. Moreover, the prosecutor actively interfered with Lynch's ability to dispute this precise issue when the prosecutor objected to the introduction of the guilty verdicts. *See* I. 661 (State's objection to Notice of Mitigation Evidence); 684 (trial court ruling prohibiting introduction of guilty verdict as mitigation evidence).

The prosecutor then extended his assurances to the conduct of the police officers. When discussing the blood and DNA analyses, the prosecutor assured the jury, "the Scottsdale Police Department did its darndest." RT 8/9/2012, 51. This was reiterated with the guarantee, "They tried." *Id.* In doing so, the prosecutor again

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[4] *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368 (1982); *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676 (1987).

placed his weight and position, and thus the weight and position of the government, behind the conduct of the police department, vouching for the adequacy of their work.

The prosecutor then hoisted testimony to the equivalent status of guarantees:

> And if Sehwani, the little guy, had had his hand like that, it would have gotten his DNA material right there.
>
> Those are the law. That's just the way it works. You can go to a fanciful area. You can go wherever you want. You may want to try to change that. But when you cut someone's carotid artery -- and you saw that photograph -- blood shoots out irrespective of however you want to couch it.

Id. at 52-53. By framing testimony about blood spatter as "law", the prosecutor used his position and an implied understanding of "the law" of blood spatter to bolster the weight of the evidence.

In the rebuttal arguments, the prosecutor directly referenced his position as the State. *Id.* at 89. The prosecutor placed the weight of the State behind his disagreement with mitigating circumstances:

> And under the facts of this case, if you take a look at that horrific way that this individual died, and you take a look at what has been proposed as mitigating circumstances -- because by no means the State does not agree that those are mitigating circumstances -- take a look back.

Id. at 89. The prosecutor very clearly referenced the authority of the State, placed the authority behind a claim in dispute, and used the authority to persuade the jury to agree with the authority of the State.

b. The State implied facts not in evidence supported conviction.

In *State v. Leon*, this Court condemned a prosecutor's reference to police reports containing information the jury did not get to hear. 190 Ariz. 159, 161, 945 P.2d 1290, 1292 (1997). The prosecutor told the jury they were not going to have the "inside information" as to what occurred. *Id.* This Court stated the prosecutor's closing argument "violate[d] standards of appropriate conduct." *Id.* at 162, 1293. "Although advocates are ordinarily given wide latitude in closing argument, their comments must still be 'based on facts the jury is entitled to find from the evidence and not on extraneous matters that were not or could not be received in evidence.'" *Id.* (quoting *State v. Dumaine*, 162 Ariz. 392, 402, 783 P.2d 1184 (1989)). Finally, *Leon* discussed two dangers of prosecutorial vouching:

> [S]uch comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.

Id. at 163, 1294 (quoting *United States v. Young*, 470 U.S. 1, 18, 105 S. Ct. 1038, 1048 (1985)). Because this Court was "unable to say beyond a reasonable doubt that the prosecutor's misconduct did not contribute to the verdict," the conviction was reversed. *Id.*

The prosecutor blatantly referenced facts outside the record when the prosecutor referenced statements of Tera Potts:

> [MR. MARTINEZ:] One of the things Tera Potts said was that, well, when we got to that area, out on Cholla, we knocked on the front door. Nobody came. Finally this little guy, this little guy came. In order to make sure that we get that correct, I will read to you what she testified to. She said, we were in the front. This guy came up. And what about that guy –
>
> MR. BLIEDEN: Objection. Her testimony is not in evidence.
>
> THE COURT: Sustained.
>
> MR. MARTINEZ: One of the things that was presented was that -- and it was read from the witness stand, and you will see what items of evidence you can take back, whether or not that transcript is in evidence or not. One of the things that she indicated was that, who was the person there that came out? It was the little guy.

RT 8/9/2012, 49. The testimony was not in evidence, the prosecutor's reference to testimony was objected to, the trial court correctly sustained the objection, and the

prosecutor's response was a reiteration of the testimony, "whether or not that transcript is in evidence or not." The prosecutor referenced and relied upon evidence outside the record.

10. The State urged the jury to apply the wrong legal standard.

"The state may not misstate the law to the jury." *State v. Serna*, 163 Ariz. 260, 266, 787 P.2d 1056, 1062 (1990) (citing *State v. Tims*, 143 Ariz. 196, 200, 693 P.2d 333, 337 (1985) ("The prosecutor should not misstate the law in closing argument.") and *State v. Daymus*, 90 Ariz. 294, 303-04, 367 P.2d 647, 653 (1961) ("It is improper to misstate the law in argument but not necessarily prejudicial.")).

The first misstatement of law dealt with appreciation of wrongfulness. The prosecutor asserted the only way Lynch could prove he failed to appreciate the wrongfulness of his conduct was to admit he personally committed the murder. RT 8/9/2012, 62-63. This is certainly not the case. A person can fail to appreciate the wrongfulness of his conduct as an accomplice. The prosecutor misrepresented the meaning of the mitigating factor. The prosecutor argued the mitigating factor did not apply because Lynch did not "[s]tart eating some Doritos" or "hang out with the dog" after the offense had been committed. *Id.* at 63. The prosecutor's argument ignores that this mitigating factor is a sliding consideration.

In *State v. Trostle* this Court defined the extremes of this mitigating factor. The mitigating factor is strongly applied where a defendant has, "organic brain damage, dementia, a low IQ bordering on retarded, and a serious personality disorder." 191 Ariz. 4, 21, 951 P.2d 869, 866 (1997) (citing *State v. Stuard*, 176 Ariz. 589, 863 P.2d 881 (1993)). Conversely, where there was no evidence a defendant had been abused or suffered any emotional or personal problems, the mitigating factor did not exist. *Id.* (citing *State v. Gerlaugh*, 144 Ariz. 449, 698 P.2d 694 (1985)). From these extremes, this Court concluded, "the weight to be given mental impairment should be proportional to a defendant's ability to conform or appreciate the wrongfulness of his conduct." *Id.*; *accord State v. Canez*, 202 Ariz. 133, ¶ 122, 42 P.3d 564, ¶ 122 (2002).

Lynch lies somewhere between the extremes. Lynch does not have the confluence of disorders exhibited in *Stuard*. However, unlike *Gerlaugh*, evidence was presented regarding the abuse Lynch suffered as a child and the long-term impact of this abuse. Additionally, Lynch presented evidence of ongoing substance abuse. Thus, the jury should have been free to assign an appropriate weight to this mitigating factor. Contrary to the law, the prosecutor argued the mitigating factor was a yes or no proposition. The trial court then endorsed the prosecutor's legal interpretation when the trial court overruled a timely objection. *See e.g. U.S. v. Pearson*, 746 F.2d 787, 796 (11th Cir. 1984) (ruling trial court's failure to sustain objection and provide

curative instruction to prosecutor's comments on defendant's non-testimonial demeanor "gave the jury an incorrect impression" the demeanor was evidence which could be considered). In effect, the trial court legally advised the jury that the prosecutor's legal argument was correct.

The prosecutor also misstated the law when the prosecutor argued the jury should consider a long-accepted mitigating factor as aggravation. This Court has consistently considered a history of substance abuse a mitigating factor. *E.g. State v. Velazquez*, 216 Ariz. 300, ¶ 73, 166 P.3d 91, ¶ 73 (2007); *State v. Newell*, 212 Ariz. 389, ¶ 86, 132 P.3d 833, ¶ 86 (2006). This is particularly true when substance abuse is related to the commission of the offense, as here. However, the prosecutor argued a history of substance abuse should be viewed as a reason to impose a harsher penalty. RT 8/9/2012, 64-65. The prosecutor directly asserted such a mitigating factor was "upside down" logic and was a "bad thing." *Id.* Such an argument is naive and represents an oversimplified view of substance abuse and mental health issues. By arguing a history of substance abuse was a "bad thing," the prosecutor urged the jury to use a common non-statutory mitigating factor as aggravation.

The prosecutor misstated the law when discussing character and the purchase of adult videos. RT 8/9/2012, 65-66. The trial court correctly ruled this argument was improper and sustained the Defense objection. *Id.*

A dysfunctional childhood has long been considered a mitigating factor. *State v. Gretzler*, 135 Ariz. 42, 58, 659 P.2d 1, 17 (1983) ("Evidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation.") (citing *Eddings v. Oklahoma*, 455 U.S. 104, 115, 102 S.Ct. 869, 876 (1981)); *see also State v. Prince*, 226 Ariz. 516, ¶ 109, 250 P.3d 1145, ¶ 109 (2011) ("A difficult or traumatic childhood is a mitigating circumstance."). It is certainly true, "[d]ifficult childhood circumstances ... receive less weight as more time passes between the defendant's childhood and the offense." *Prince*, 226 Ariz. 516, ¶ 109, 250 P.3d 1145, ¶ 109. However, the prosecutor mischaracterized the nature of mitigating circumstances when the prosecutor argued Lynch's traumatic childhood was "an excuse, not a mitigating factor." RT 8/9/2012, 74. The prosecutor did not argue minimal weight should be given to the mitigating circumstance. The prosecutor argued it was not a mitigating circumstance at all. This argument misstated the law.

The prosecutor also misstated the law when the prosecutor argued a life sentence would "[g]ive [Lynch] a free bite of the apple," and the fact that Lynch would die in prison as a result of other sentences already imposed was "nothing more than a sentence." RT 8/9/2012, 77-78. Dealing with a double jeopardy issue, the United States Supreme Court clearly stated, "[a] separate conviction, apart from the concurrent sentence, has potential adverse collateral consequences that may not be

ignored." *Ball v. United States*, 470 U.S. 856, 865, 105 S.Ct. 1668, 1673 (1985) (emphasis added). Lynch's conviction of murder, even if sentences are imposed concurrently to other counts, is a separate conviction which carries potential collateral consequences. The separate conviction is much more than a "free bite of the apple," even if the sentences are concurrent and Lynch will die in prison as a result of other convictions. Moreover, the prosecutor's argument ignores the nature of mitigation. The sentencing jury must consider as mitigation, "any factors proffered by the defendant or the state that are relevant in determining whether to impose a sentence less than death ...." A.R.S. § 13-751(G) (emphasis added). The statute mandates the consideration of "any" factor which is offered that is relevant when deciding whether to impose a lesser sentence. The proffered evidence is certainly relevant. Thus, the prosecutor's argument was legally incorrect. Again, the prosecutor did not limit his argument to how much weight should be given to the mitigating factor; the prosecutor incorrectly argued the evidence was "not a mitigating circumstance."

Finally, the prosecutor repeatedly misstated the law when the prosecutor expanded the (F)(6) aggravating factor to two separate aggravating factors. During voir dire of the first panel the prosecutor argued:

> The other one that's been talked to you about and it was talked to you at length was -- is this crime and this is one aggravating factor, was committed in an especially cruel,

> especially heinous or especially depraved fashion but the prior jury has already found that he was guilty not only of it -- even though it's one factor, especially depraved, that's what they found, it was especially heinous.

RT 7/10/2012, 75-76. The Defense objected that Mr. Martinez was addressing single prongs of the aggravator. *Id.* at 76. The trial court instructed Mr. Martinez to make the issue clear. *Id.* The Defense moved to strike Mr. Martinez's statement but the trial court denied the request. *Id.* at 76-77 Immediately after the ruling the prosecutor argued:

> MR. MARTINEZ: I previously indicated to you that there were two aggravating factors, one of them was the pecuniary gain as I called it and the second factor -- it is only one factor. I'll say it again, does anybody have any misconception that the second factor is only one factor?
>
> THE COURT: Could you tell the jury again what the second aggravating factor is?
>
> MR. MARTINEZ: The second factor is especially cruel, heinous or depraved, that is how it is defined. It can be found by either being cruel, heinous or depraved. What you're going to hear, and it's just one factor, that it was found to be especially heinous, especially cruel and especially depraved, but it is one factor and it can be proven by -- in the disjunctive or --

Id. at 77-78. The Defense objected to the word "and" *Id.* at 78. The trial court sustained this objection.

The court discussed this misstatement before voir dire of the second panel. *Id.* at 111. [5] Mr. Martinez argued this Court authorized the discussion of the (F)(6) aggravator in the disjunctive through this Court's determination that the aggravating factor had been proved. *Id.* at 112-13. The trial court agreed with the Defense that framing the (F)(6) aggravator as "heinous, cruel and depraved," "sounds like it's more than one aggravating circumstance." *Id.* at 113. Upon the prosecutor's request, the trial court clarified, "I'm talking about telling the jury that two aggravating circumstances were found and then in that same sentence, telling them, and they found cruel, heinous and depraved, because it sounds like there were more than two aggravating circumstances found when you say it like that." *Id.* at 115. Mr. Martinez again attempted to clarify and again the trial court was forced to reiterate, "it's or depraved, not and depraved, right? Yeah." *Id.*

Nonetheless, during closing arguments the prosecutor improperly expanded the (F)(6) aggravating factor into two separate aggravating factors:

> The State has already proved the aggravating circumstances beyond a reasonable doubt, the highest of all standards. And what were those two aggravating circumstances? Well, the first one is the defendant committed the murder in

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[5] The Defense had previously filed a Motion *in Limine* re: F(6) Nomenclature on June 25, 2012. I. 706. The trial court had apparently not seen this motion. *See* RT 7/10/2012, 113-14.

an especially heinous, cruel or depraved manner. He, not (sic) Shawn Patrick Lynch, this individual here committed this in an especially cruel or depraved manner.

Let's talk about cruelty first. That talks to the victim's pain and suffering. That's what that refers to. It tells you that the term cruel focuses on the victim's pain and suffering. Cruelty involves the infliction of physical pain or mental anguish on a victim before death. That has been proven that he did it. Irrespective of what Sehwani did, he did that. He inflicted upon James Stanley Panzarella physical pain or mental anguish before the victim's death. That's been established.

The other thing it says that a crime is especially cruel when Shawn Patrick Lynch -- it says defendant, but it's Shawn Patrick Lynch -- intended, he intended or knew the manner in which the crime was committed was going to cause the victim physical pain or mental anguish. We have the especially heinous or depraved issue. It indicates that -- as opposed to the victim, it focuses on the defendant. It focuses upon his state of mind at the time of the offense as reflected by the defendant's words and acts. What does the defendant do? A murder is especially heinous if it is hatefully or shockingly evil. That's what he has been found to have committed, a hatefully, shockingly evil murder. Him. Not Sehwani. Those are at his doorsteps. Those are at his basket. It is not subject to debate when you go back there. And you did indicate that you would follow the jury instructions.

Id. at 80-81.

This Court made very clear, in this case, "Our decisions make plain that the (F)(6) aggravator is a single aggravating circumstance that can be established in

alternative ways." *State v. Lynch*, 225 Ariz. 27, ¶ 84, 234 P.3d 595, ¶ 84 (2010). In the previous trial, the trial court instructed the jury and the same prosecutor argued the (F)(6) aggravator was three aggravating factors. *Id.* at ¶ 83. This Court vacated the previous sentence because of the error. *Id.* at ¶¶ 88-89. Giving no weight to this Court's holding, the prosecutor argued the (F)(6) was two separate aggravating factors. This was done through the prosecutor's separation of the two concepts. Before trial, the prosecutor requested instructions which separated the (F)(6) aggravator. I. 674. During voir dire the prosecutor analytically separated the (F)(6) aggravator and had to be instructed by the trial court to appropriately reference (F)(6) as a single aggravating factor. RT 7/10/2012, 75-78, 111-15. Finally, the prosecutor separated the (F)(6) aggravator to two separate aggravating factors during closing arguments. RT 8/9/2012, 80-81. The prosecutor conceptually separated cruelty from heinousness and depravity. *Id.* Moreover, the prosecutor asserted two separate aggravating factors had been previously proved. *Id.* at 81 ("Cruelty involves the infliction of physical pain or mental anguish on a victim before death. That has been proven that he did it."), 81 ("A murder is especially heinous if it is hatefully or shockingly evil. That's what he has been found to have committed, a hatefully, shockingly evil murder."). The prosecutor further demonstrated his intent to misstate the (F)(6) aggravator by compounding the pecuniary gain aggravating factor as an

additional factor beyond the "aggravating circumstances" already discussed. *Id.* at 81-82 ("So what is it then when you're going to compare those three aspects, the murder and the aggravating circumstances, but there is also this indication that it was for pecuniary gain.").

This Court has clearly and repeatedly held the (F)(6) aggravating factor is a single factor. This very prosecutor previously argued the (F)(6) aggravator was three separate aggravating factors in this very case. When this Court again clarified the (F)(6) aggravator is a single factor, this same prosecutor ignored this Court and merely modified his argument to two separate aggravating factors. By separating the (F)(6) aggravator into two separate factors and compounding the pecuniary gain aggravator as an additional factor, the State sought to convince the jury three aggravating factors existed where there were only two. This prosecutor has made clear it is his intent to

ignore this Court and the law and to engage in sophistry in his attempt to win at all costs. [6]

11. The prosecutor commented on Mr. Lynch's decision to not testify.

The United States Constitution and Arizona Constitution each independently guarantee criminal defendants the right to remain silent. U.S. Const. Amend. 5; Ariz.Const. Art. 2, § 10. "[C]omment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice,' which the Fifth Amendment outlaws." *Griffin v. California*, 380 U.S. 609, 614; 85 S.Ct. 1229, 1232 (1965) (internal quotation omitted). As a result, "a prosecutor is prohibited both by constitution and

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[6] The record in this case also makes clear Mr. Martinez's intent was to present the (F)(6) aggravator as multiple factors and was not merely a misstatement. Mr. Martinez's mischaracterization was also reflected during a discussion on May 24, 2012. *See* RT 5/24/2012, 4 ("My preference would be to call the witnesses that I need to show the four factors I proved previously so that the jury can consider them in weighing the mitigation." (emphasis added)), 13-14 (requesting instructions to enable his argument the (F)(6) aggravator was four separate aggravating factors). Later, Mr. Martinez attempted to obtain jury instructions which framed the (F)(6) aggravator as three separate concepts. *See* I. 674 (requesting jury instruction for aggravating factor, "Shawn Patrick Lynch committed the murder in an especially heinous, cruel and depraved manner" (emphasis added)). This instruction prompted the Defense to file a Motion *in Limine* re: (F)(6) Nomenclature. I. 706. The Defense argued the prosecutor's requested jury instruction, and persistent misstatements of the aggravator in the conjunctive, misstated the law. *Id.* The trial court addressed this issue on July 10, 2012. *See* I. 709, pg. 3-4. The trial court ordered the parties to only refer to two aggravating factors.

by statute from bringing to the jury's attention either directly or indirectly the fact a defendant did not testify." *State v. Schrock*, 149 Ariz. 433, 438, 719 P.2d 1049, 1054 (1986). In *Schrock* this Court set forth standards to evaluate if a prosecutor's statement improperly comments on a defendant's right to refuse to testify. *Id.* at 438-39, 1054-55. This Court reviews the context of a statement "to determine whether the jury would naturally and necessarily perceive them to be a comment on the failure of the defendant to testify." *Id.* For a statement to be constitutionally improper, "the comment must (1) be adverse, in that it supports an unfavorable inference against the defendant, and (2) operate as a penalty for defendant's exercise of his constitutional right." *Id.*

In *State v. Decello* this Court evaluated a prosecutor's argument "no one, no one, no one got up on this stand and testified to you contrary to what was testified to you by the witnesses." 113 Ariz. 255, 258, 550 P.2d 633, 636 (1976). This Court concluded the argument "was certainly calculated to point out to the jury that the defendant had not taken the stand and testified," and reversed the conviction. *Id.* The focus on whether an improper comment is "calculated to point out to the jury that the defendant had not taken the stand and testified" has been extended by the lower courts as a method for deciding if prosecutorial comment was error. *E.g. State v. Martinez*, 130 Ariz. 80, 82, 634 P.2d 7, 9 (App. 1981) ("[A] prosecutorial comment on a

defendant's failure to testify is objectionable if such reference is calculated or intended to direct the jury's attention to the fact that a defendant has chosen to exercise his fifth amendment privilege.").

In *State v. Trostle* the prosecutor argued only two people knew information regarding the offense, "One is Jack Jewitt and the other one is sitting right here at the table asking you not to hold him accountable through his lawyer." 191 Ariz. 4, 16, 951 P.2d 869, 881 (1997). This Court found the statement "an impermissible comment on defendant's failure to testify," but found the error harmless beyond a reasonable doubt. *Id.*

Here, the prosecutor posed two questions—"What's going on?" and "Were words exchanged?"—that could only be answered by Lynch. RT 8/9/2012, 86. Just as in *Trostle*, there were only two people who could answer the questions posed by the prosecutor: the victim and Mr. Lynch. The prosecutorial comment "was certainly calculated to point out to the jury that the defendant had not taken the stand and testified." *See Decello*, 113 Ariz. at 258, 550 P.2d at 636. While such comment, in isolation, might not be sufficient to warrant reversal, it should be given substantial weight in an evaluation of the cumulative impact of prosecutorial misconduct.

12. Improper personalization during opening statement and closing argument.

Analyzing a civil case, this Court disapproved of "golden rule" arguments. *See Taylor v. DiRico*, 124 Ariz. 513, 518, 606 P.2d 3, 8 (1980). In *Taylor* the trial counsel objected to the improper argument and the trial court sustained the objections. *Id.* In light of the trial court's conduct, the extent of the argument in *Taylor* was not sufficient to warrant intervention. *Id.* However, whether the "golden rule" label appropriately applies to criminal cases has been called into question in other jurisdictions. *See State v. Pierce*, 169 Wash.App. 533, ¶ 58 fn.9, 280 P.3d 1158, ¶ 58 fn.9 (Wash.App. 2012).

While not using a specific label, this Court reviewed similar misconduct in a criminal setting under a fundamental error review in *State v. Morris*, 215 Ariz. 324, 160 P.3d 203 (2007), a case involving this same prosecutor. While this Court found that remarks which encouraged the jurors to step into the victim's shoes and played on fears of the defendant constituted misconduct, the error was not fundamental and there was no prejudice. *Id.* at ¶¶ 58-61. Division 2 of the Court of Appeals also briefly addressed the issue in *State v. Sowards*, 147 Ariz. 185, 191-92, 709 P.2d 542, 548-49 (App. 1984). Without discussing the specific comments, the Court ruled, "As for placing oneself in the role of the victims, or of considering one's relatives in the role

of the victims, this argument was improper but the error is harmless in view of the overwhelming proof of guilt." *Id.* at 192, 549.

Missouri has labeled this form of improper argument as "improper personalization." *See State v. Rhodes*, 988 S.W.2d 521, 528 (Mo. 1999). The Missouri Supreme Court, addressing an argument that encouraged jurors to hold their breaths and imagine it was the last one, noted, "Arguing for jurors to place themselves in the shoes of a party or victim is improper personalization that can only arouse fear in the jury." *Id.* (internal quotation marks and citations omitted). The Missouri Supreme Court reversed the imposition of a death penalty because of the improper argument:

> Trial court error, timely preserved, creates the presumption of prejudice. Since appellant objected to this error both at trial and in his motion for new trial, and because the improper personalization denied appellant a fair trial on the issue of punishment, the sentence of death is reversed.

Id. at 529 (internal citations omitted).

The State clearly encouraged the jury to place themselves in the shoes of the victim during opening statements. RT 7/17/2012, 93. The prosecutor argued:

> So what happens is the defendant then, as Mr. Panzarella sits there, goes behind him and begins and cuts his throat from ear to ear. The problem of the unfortunate aspect of that, because in and of itself, cutting somebody's throat is a horrific, ghastly thing, you can only imagine. I don't think

> you can even imagine what it's like for somebody to approach you with a knife. You cannot move and you know they're manhandling you and they are going to cut your throat.

RT 7/17/2012, 93. The defense objected. *Id.* Before the defense even articulated the reason for its objection, the trial court correctly sustained the objection and then granted the defense motion to strike. *Id.*

In closing arguments the prosecutor argued:

> So I will leave you a close -- with a line by a poet by the name of John Donne who indicated that every person's death diminishes, so therefore send no one to find for whom the bell tolls, it tolls for thee. In this case, it tolls for each and every one of you to -- in light of the fact that there are no mitigating circumstances and if there are, they're so remote. They are of such little value. But it tolls for each and every one of you, in light of the evidence in this case, to return a verdict of death on Shawn Patrick Lynch.

RT 8/9/2012, 89. The prosecutor's argument linked the jurors to the victims through the interrelation referenced directly in the argument and in the poem. The argument expressly noted the prosecutor's interpretation of one premise of the poem: "every person's death diminishes," and thus, "In this case, it tolls for each and every one of you." Notably, John Donne's poem discussed the interrelation of humans. The language to which the prosecutor alluded reads:

> No man is an island, entire of itself; every man is a piece of the continent, a part of the main. If a clod be washed away

> by the sea, Europe is the less, as well as if a promontory were, as well as if a manor of thy friend's or of thine own were: any man's death diminishes me, because I am involved in mankind, and therefore never send to know for whom the bells tolls; it tolls for thee.

John Donne, Devotions Upon Emergent Occasions, pg. 108-09 (accessed at http://www.gutenberg.org/files/23772/23772-h/23772-h.htm). The interconnected nature of people is referenced elsewhere in the meditation. *Id.* at 107-08. By referencing this language, the prosecutor connected the jurors to the victim; the victim's death meant the bells tolled for the jurors the same as the victim. That this connection was made in a more artistic and clever manner does not diminish the strength of the connection. The prosecutor encouraged the jury to place themselves in the position of the victim by expressly arguing that the victim's death diminished the jurors.

Mr. Martinez knew his conduct was improper and intended the misconduct to avoid a life verdict.

In reviewing a claim of prosecutorial misconduct, the appellate court's "focus is on the fairness of the trial, not the culpability of the prosecutor." *State v. Bible*, 175 Ariz. 549, 601, 858 P.2d 1152, 1204 (1993). However, a prosecutor's intent or indifference is at issue and can be measured in many ways which touch upon facts which might seem to be addressing the prosecutor's culpability, but which are in fact

relevant to highlight that the errors were not inadvertent, accidental or related to inexperience. Whether the prosecutor's misconduct is isolated or a consistent pattern is relevant. *See State v. Minnitt*, 203 Ariz. 431, ¶ 37, 55 P.3d 774, ¶ 37 (2002) ("Like the misdeeds in [*Pool v. Superior Court In & For Pima Cnty.*, 139 Ariz. 98, 108, 677 P.2d 261, 271 (1984)], Peasley's misdeeds were not isolated events but became a consistent pattern of prosecutorial misconduct that began in 1993 and continued through retrial in 1997 "); *State v. Jorgenson*, 198 Ariz. 390, ¶ 14, 10 P.3d 1177, ¶ 14 (2000) ("This is perhaps the third or fourth time that the conduct of this same prosecutor has raised the same type of problem. It is unfortunate that he was permitted to try so serious a case and, without proper supervision, permitted to try it in such an improper manner.").

The experience level of the prosecutor is relevant. *See Minnitt*, 203 Ariz. 431, ¶ 38, 55 P.3d 774, ¶ 38 (2002) (in reversing a conviction for prosecutorial misconduct which permeated the trials in question, this Court noted, "Peasley is not an inexperienced prosecutor, but rather a veteran homicide prosecutor"). In disciplinary cases involving prosecutorial misconduct, the experience of the prosecutor renders conduct more egregious. *In re Peasley,* 208 Ariz. 27, ¶ 40, 90 P.3d 764, ¶ 40 (2004) ("[W]hen a lawyer's substantial experience places that lawyer in a position that would be unavailable to a less experienced lawyer, and that lawyer's experience also affords,

or should afford, a greater appreciation of the advantages of eliciting false testimony, substantial experience may be considered a relevant aggravating factor."); *In re Zawada*, 208 Ariz. 232, ¶ 22 , 92 P.3d 862, ¶ 22 (2004) ("Peasley's extensive experience as a prosecutor helped him understand how a jury would react to unfavorable evidence. Accordingly, he suborned perjured testimony to destroy the negative inference the jury would otherwise have drawn.").

Notably, Mr. Martinez's conduct has been before this Court on at least four previous occasions. *E.g. State v. Dixon*, 226 Ariz. 545, ¶¶ 6-11, 250 P.3d 1174, ¶¶ 6-11 (2011); *State v. Gallardo*, 225 Ariz. 560, ¶¶ 33-47, 242 P.3d 159, ¶¶ 33-47 (2010); *State v. Lynch*, 225 Ariz. 27, ¶¶ 54-65, 234 P.3d 595, ¶¶ 54-65 (2010); *State v. Morris*, 215 Ariz. 324, ¶¶ 46-67, 160 P.3d 203, ¶¶ 46-67 (2007). While not expressly raising a claim of prosecutorial misconduct, the propriety of Mr. Martinez's closing argument comments was also raised in *State v. Andriano*, 215 Ariz. 497, ¶ 28 fn.3, 161 P.3d 540, ¶ 28 fn.3 (2007). During his prior appeal to this Court, Lynch raised several claims related to Mr. Martinez's conduct which echo the arguments raised herein. *See* OB 12/8/2008, 2008 WL 6587570, 90-101. Previously raised in the first appeal, Martinez committed misconduct during opening statements,[7] attacked the ethics and

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[7] *Id.* at 91-94 (arguing Martinez improperly referred to Lynch as a murderer and promised to produce evidence that was never presented).

integrity of both the expert witness and defense counsel,[8] vouched for the evidence,[9] misstated the law and nature of evidence,[10] and engaged in improper personalization and appealed to the passions of the jurors.[11]

A review of this case and this Court's jurisprudence regarding this prosecutor reveals Mr. Martinez has a particular history of attempting to sway jurors based upon emotion. In *Morris*, Mr. Martinez encouraged the jury to place themselves in the position of the victim. 215 Ariz. 324, ¶ 57, 160 P.3d 203, ¶ 57 This Court found Mr. Martinez's comments were misconduct. *Id.* at ¶ 58. However, because the defense failed to object, this Court reviewed for fundamental error. *Id.* at ¶ 59. This Court concluded the misconduct was not fundamental. *Id.* at ¶ 60.

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[8] *Id.* at 94-96 (arguing Martinez improperly suggested defense counsel and expert witness "were hiding unfavorable testing results and defense counsel had purposefully set up the expert's testimony to hide this unfavorable information by giving her "marching orders" in the email the court refused to admit into evidence"), 99 (arguing Martinez improperly accused expert witness of shredding documents in an unrelated case).

[9] *Id.* at 95-96 (arguing Martinez improperly vouched by suggesting "he had information from outside the record that supported the State's expert's opinion that the reason Appellant was not psychologically tested was that the results were unfavorable").

[10] *Id.* at 56, 96-97, 101 (arguing Martinez misstated the law regarding weighing mitigation).

[11] *Id.* at 99-101 (arguing Martinez improperly encouraged the jury to "compare" the mitigation "with the victim's mother's love for her son" and appealed to the passions of the jury).

In the appeal of the previous trial for this case, Lynch raised a similar argument. *See* OB 12/8/2008, 2008 WL 6587570, 99-100. In the previous trial Mr. Martinez "repeatedly implored the jury to 'compare' Appellant's submitted mitigation, including the love of his family and friends, with the victim's mother's love for her son." *Id.* at 99. This Court did not reach the issue. *See generally Lynch*, 225 Ariz. 27, 234 P.3d 595. This was likely because the misconduct arose during the sentencing phase and this Court ordered a new sentencing phase for different reasons. *See id.* at ¶¶ 82-89.

Similarly, in *Gallardo* Mr. Martinez again asked the jury to compare the victim to the defendant. 225 Ariz. 560, ¶¶ 41-42, 242 P.3d 159, ¶¶ 41-42. This Court analytically presumed such conduct was improper. *Id.* at ¶ 42. However, this Court found the standard jury instruction that the jury should not be swayed by sympathy "negated the effect of the prosecutor's statements." *Id.* at 42.

Although Mr. Martinez's previous appeals to juror sympathy and fears have been raised three times, evaluated twice, presumed misconduct once, and expressly found to be misconduct once, Mr. Martinez engaged in the exact same behavior in this case. Martinez encouraged the jury to place themselves in the position of the victim in both the opening statement and closing argument. *See* discussion regarding "Improper personalization during opening statement and closing argument," section 12, *supra*.

The effect of this Court's rulings has been to empower Mr. Martinez to engage in prosecutorial misconduct more consistently. This prosecutor is aware that he can cross the boundaries of professional ethics and any convictions he obtains are safe. This prosecutor has become confident this Court will take one of two steps: 1) this Court will approve of his conduct, or 2) even if this Court does not approve of his conduct, this Court will find error harmless.

Appellants have also previously complained Mr. Martinez has misstated the nature of evidence. *See State v. Morris*, 215 Ariz. 324, ¶¶ 50-56, 160 P.3d 203, ¶¶ 50-56 (alleging Martinez misstated evidence when arguing motive for the murder); *State v. Andriano*, 215 Ariz. 497, ¶ 28, 161 P.3d 540, ¶ 28 (alleging Martinez "took every opportunity to infuse the trial with marginally relevant information about Andriano's partying and man-chasing"); *State v. Lynch*, 225 Ariz. 27, ¶¶ 59-64, 234 P.3d 595, ¶¶ 59-64 (alleging several misstatements); *State v. Gallardo*, 225 Ariz. 560, ¶¶ 43-44, 242 P.3d 159, ¶¶ 43-44 (Mr. Martinez misstating nature of expert testimony about payment and bias as inconsistent statements). This Court agreed Martinez committed misconduct in *Gallardo* by misstating the evidence and reiterating the argument after a sustained objection. 225 Ariz. 560, ¶ 44, 242 P.3d 159, ¶ 44. However, this Court again relied upon the standard instructions to excuse Mr. Martinez's misconduct. *Id.*

Here again, Mr. Martinez repeatedly mischaracterized the nature of evidence. This was done through misstatements of evidence and misstatements of law. Drawing a particular similarity to *Gallardo*, the prosecutor misstated the nature of Dr. Jolie Brams's statements during cross-examination. RT 7/19/2012 (Fraley), 41-42. Martinez also misstated the nature of evidence related to the purchase of pornographic movies when he argued the purchase was proof of debasement of character. RT 8/9/2012, 65-66. Again, that this Court has overlooked Mr. Martinez's prior misconduct has emboldened Mr. Martinez. His misstatements have become more egregious and common, as evidenced by the vast number of misstatements made.

Finally, one misstatement of law is especially egregious in light of this Court's jurisprudence and the law of this very case. This Court reversed the prior death sentence in this case because of an improper instruction regarding the (F)(6) aggravating factor. *Lynch*, 225 Ariz. 27, ¶¶ 82-89, 234 P.3d 595, ¶¶ 82-89. Mr. Martinez cited the instruction and argued the (F)(6) aggravating factor was three separate aggravating factors. *Id.* at ¶ 83. This Court was clear: "Our decisions make plain that the (F)(6) aggravator is a single aggravating circumstance that can be established in alternative ways." *Id.* at ¶ 84. Despite this Court's ruling "that the (F)(6) aggravator is a single aggravating circumstance," Mr. Martinez argued the (F)(6) aggravator was two separate factors. RT 8/9/2012, 80-81.

Mr. Martinez is an experienced prosecutor. His misconduct, while noted and even condemned by this Court, has escaped repercussions. As a result, Mr. Martinez has become more emboldened and more willing to commit further misconduct. Based upon Mr. Martinez's history and experience, Mr. Martinez certainly knows he should not appeal to the passions of the jury, accuse experts or defense counsel of unethical conduct, or misstate the law. Mr. Martinez's misconduct can only be seen as intentional conduct aimed to avoid a life verdict.

ARGUMENT 2

THE TRIAL COURT IMPROPERLY LIMITED THE SENTENCING PHASE WHEN THE TRIAL COURT DENIED LYNCH'S MOTION FOR RETRIAL OF AGGRAVATING CIRCUMSTANCES AND NOTICE OF MITIGATION EVIDENCE.

Standard of Review:

Issues regarding the interpretation of statutes and court rules are reviewed *de novo*. *State v. Hansen*, 215 Ariz. 287, ¶ 6, 160 P.3d 166, ¶ 6 (2007). Additionally, alleged constitutional violations are reviewed *de novo*. *State v. McGill*, 213 Ariz. 147, ¶ 45, 140 P.3d 930, ¶ 45 (2006).

Factual Background:

This Court vacated Lynch's previous sentence in *State v. Lynch*, 225 Ariz. 27, 234 P.3d 595 (2010). The sentence was vacated because the trial court had improperly instructed the jury during the penalty phase. *Id.* at ¶ 84. This Court ordered:

> For the reasons above, we affirm the convictions and non-capital sentences, but remand for a new penalty phase proceeding on the murder conviction. Any new penalty phase jury should be instructed that the (F)(5) and (F)(6) aggravators have been previously found and that it is not to retry those issues.

Id. at ¶ 89 (citing A.R.S. § 13-752(K)).

Upon remand, the Defense filed a Motion for Retrial of Aggravating Circumstances. I. 637 The Defense argued A.R.S. § 13-752(N) applied and required retrial of the aggravation phase as well. *Id.* The Defense also filed a Notice of Mitigation Evidence re: Guilty Verdicts. I. 647 Lynch argued the prior guilty verdicts, particularly the split regarding premeditated murder, was relevant to the jury's determinations. *Id.*

The State responded to the Motion for Retrial of Aggravating Circumstances on March 7, 2012. I. 654. The State argued, under paragraph 89 of this Court's Opinion, retrial on the aggravating factors was not appropriate. *Id.* The State also filed an Objection to Introduction of Guilt Phase Verdict Form. I. 661. The State argued the theory of conviction was irrelevant. *Id.*

The Motion for Retrial of Aggravating Circumstances was briefly addressed on April 6, 2012. RT 4/6/2012, 6. Neither party presented additional arguments and the trial court took the matter under advisement. *Id.* The parties argued the Notice of Mitigation Evidence. *Id.* at 6-15.

The trial court issued rulings on both motions on April 20, 2012. I. 684. The trial court denied the Motion for Retrial of Aggravating Circumstances, relying upon paragraph 89. *Id.* at 4. The trial court also prohibited Lynch from offering the guilty verdict as an exhibit during the penalty phase. *Id.* at 4-5.

Discussion:

1. A.R.S. § 13-752(N) requires a new aggravation phase as well as a penalty phase.

This Court correctly noted A.R.S. § 13-752 applies. This Court relied upon subsection (K), which provides:

> At the penalty phase, if the trier of fact is a jury and the jury is unable to reach a verdict, the court shall dismiss the jury and shall impanel a new jury. The new jury shall not retry the issue of the defendant's guilt or the issue regarding any of the aggravating circumstances that the first jury found by unanimous verdict to be proved or not proved. If the new jury is unable to reach a unanimous verdict, the court shall impose a sentence of life or natural life on the defendant.

A.R.S. § 13-752(K). The language of the subsection makes clear the subsection applies when a jury has reached a decision on aggravation, but was unable to decide upon a penalty. A different subsection deals with remands after a death sentence has been vacated:

> If the sentence of a person who was sentenced to death is overturned, the person shall be resentenced pursuant to this section by a jury that is specifically impaneled for this purpose as if the original sentencing had not occurred.

A.R.S. § 13-752(N) (emphasis added). The scope of "the original sentencing" then becomes the primary inquiry. The same statute provides the answer:

> If the trier of fact finds the defendant guilty of first degree murder, the trier of fact shall then immediately determine

> whether one or more alleged aggravating circumstances have been proven. This proceeding is the aggravation phase of the sentencing proceeding.

A.R.S. § 13-752(C); *see also* A.R.S. § 13-752(D) (defining the "penalty phase of the sentencing proceeding"). The statutory scheme sets up a "sentencing proceeding" which consists of two phases: an aggravation phase and a penalty phase. Whereas subsection (K) distinguishes between the two phases when a jury is unable to reach a decision in the first trial, subsection (N) does not distinguish between the two phases when a death verdict has been overturned. *Cf.* A.R.S. §§ 13-752(K) and (N). Rather, when a death sentence has been overturned, subsection (N) requires a person be resentenced "as if the original sentencing had not occurred." Provided the context of the statute, this subsection requires both "phases" of the "sentencing proceeding" begin anew.

This interpretation is in accord with this Court's prior jurisprudence upon the issue. In *State v. Pandeli*, 215 Ariz. 514, 161 P.3d 557 (2007), this Court confronted a death resentencing. The defendant argued the prior finding of an aggravating circumstance should not have been disturbed. *Id.* at ¶ 15. This Court rejected the argument:

> This language [from *State v. Montano*, 206 Ariz. 296, 77 P.3d 1246 (2003) and *State v. Cropper*, 206 Ariz. 153, 76 P.3d 424 (2003)] did not establish the existence of the

> (F)(2) aggravating circumstance as a matter of law because we vacated the death sentences and remanded the cases for resentencing. Because Pandeli's sentence was vacated, the State was obligated to re-prove the (F)(2) aggravating circumstance on resentencing.

Id.

One year later, this language was reiterated in *State v. Armstrong*, 218 Ariz. 451, 189 P.3d 378 (2008). In Armstrong's first appeal, this Court expressly noted that "no reasonable jury could have found other than that the two murders ... were temporally, spatially, and motivationally related." *Id.* at ¶ 28 (citing *State v. Armstrong (Armstrong II)*, 208 Ariz. 360, ¶ 19, 93 P.3d 1076, ¶ 19 (2004)). This Court held, "even if a judge's finding of an aggravating circumstance was harmless error, when a death sentence was vacated and remanded for resentencing, 'the State was obligated to re-prove the ... aggravating circumstance on resentencing.'" *Id.* (quoting *Pandeli*, 215 Ariz. 514, ¶ 15, 161 P.3d 557, ¶ 15). This Court further cited A.R.S. § 13-703.01(P) for the proposition that a jury must make factual determinations to impose a death sentence. *Id.*

In 2007, when *Pandeli* was decided, and 2008, when *Armstrong* was decided, A.R.S. § 13-703.01(N) read the same as the current A.R.S. § 13-752(N).[12] While this

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[12] Additionally, the 2007 and 2008 versions of A.R.S. §§ 13-703.01(C) and (D) match the current A.R.S. §§ 13-752(C) and (D).

Court did not expressly cite A.R.S. § 13-703.01(N) in reaching its decision in either *Pandeli* or *Armstrong*, this Court's reasoning in both cases was in accordance with the statute and the citation to a different subsection in *Armstrong* indicates this Court was aware of the statute.

The Court of Appeals dealt with this precise issue in *Nordstrom v. Cruikshank*, 213 Ariz. 434, 142 P.3d 1247 (App. 2006). This Court had previously vacated Nordstrom's sentence and ordered a resentencing. *Id.* at ¶ 1. The trial court ruled "Nordstrom was only entitled to have a jury weigh the aggravating and mitigating circumstances in determining whether he should be sentenced to death ...." *Id.* The Court of Appeals highlighted the two phase nature of capital sentencing:

> Section 13-703(A) provides that a person convicted of first-degree murder shall be sentenced in accordance with the procedures set forth in § 13-703.01. The latter statute describes two phases: the aggravation phase and the penalty phase. Subsection (C) of § 13-703.01 provides that the trier of fact that finds a defendant guilty of first-degree murder must then "immediately determine whether one or more alleged aggravating circumstances have been proven."

Id. at ¶ 13 (internal citations omitted). The Court of Appeals then evaluated subsection (N):

> Subsection (N) states, however, that, "[i]f the sentence of a person who was sentenced to death is overturned, the person shall be resentenced pursuant to this section by a

> jury that is specifically impaneled for this purpose as if the original sentencing had not occurred."

Id. The Court of Appeals concluded, "The statutes plainly dictate that a capital defendant ... whose sentence of death has been overturned on appeal, must be resentenced ... ["]as if the original sentencing had not occurred." *Id.* at ¶ 15. Accordingly, the Court of Appeals found the trial court's limitations, and underlying finding that aggravating factors had been proved and would simply be submitted to the jury, error. *Id.* at ¶¶ 16, 23.

A limitation within *Nordstrom* exists which the State will likely reference. The Court of Appeals carefully noted this Court had not qualified its order or limited the scope of future sentencing in *Nordstrom*. *See Id.* at ¶¶ 15, 22. Here, this Court ordered a new penalty phase with instruction to the jury that aggravating factors had been determined. However, this is a distinction without a difference when evaluating the statutory language. The statutory scheme only authorizes one form of resentencing after a death sentence has been vacated: a resentencing "as if the original sentencing had not occurred." A.R.S. § 13-752(N). There is no mechanism under which a death sentence can be remanded for only a penalty phase. If a death sentence is vacated and remanded for any reason, the only mechanism available for resentencing requires the entire sentencing proceeding be held anew.

Thus, when this Court vacated the death sentence in *Lynch*, the remand was statutorily governed by A.R.S. § 13-752(N). Subsection (N) requires the retrial of the entire sentencing as if it had never occurred. Both phases must be retried.

To this extent, the trial court further erred when the trial court denied Lynch's Notice of Mitigation Evidence re: Guilty Verdicts. As this Court has made clear, *Enmund/Tison*[13] determinations are statutorily made by the jury during the aggravation phase. *See State v. Garcia*, 224 Ariz. 1, ¶ 44, 226 P.3d 370, ¶ 44 (2010); *State v. Garza*, 216 Ariz. 56, ¶ 46, 163 P.3d 1006, ¶ 46 (2007); A.R.S. § 13-752(P); A.R.S. § 13-703.01(P) (2006 through 2008 versions). The nature of a murder and the defendant's role are pertinent issues under an *Enmund/Tison* analysis. *See State v. Smith*, 160 Ariz. 507, 513, 774 P.2d 811, 817 (1989). As such, the verdicts issued during the previous trial were pertinent to the threshold issue of whether Lynch was eligible for the death penalty under *Enmund/Tison* and whether Lynch should be shown mercy during the penalty phase.

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[13] *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368 (1982); *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676 (1987).

2. The trial court improperly limited the sentencing proceeding when the trial court precluded the guilty verdict.

The trial court's prohibition of the guilty verdict also violated Lynch's ability to have a fair sentencing proceeding. This issue demonstrates the importance of conducting new sentencing proceedings in their entirety under A.R.S. § 13-752(N). Here, the initial jury only convicted upon a theory of felony murder. I. 299. Seven jurors found only felony murder, five jurors found both felony murder and premeditated murder. *Id.* Subsequent interrogatories indicated only eight jurors were convinced beyond a reasonable doubt Lynch personally committed the murder and only nine believed Lynch intended the murder. *See* I. 310. The jury unanimously believed Lynch had been recklessly indifferent to human life. *Id.* Notably, the jury tasked with assessing the *Enmund/Tison* factors hung on whether death was appropriate. I. 365.

This jury was simply told Lynch was eligible for the death sentence and was told certain aggravating factors existed without the ability to actually evaluate those questions. The weight of the findings is falsely heightened because the jury is advised, in essence, the findings are beyond reproach. The *Enmund/Tison* and aggravation findings are, in effect, unquestionable. Admission of the guilty verdicts

would have enabled Lynch to more effectively argue the weight of the aggravation was minimal and weight should be given to mitigating factors.

3. The limitations violated Lynch's right to an individualized sentence under the United States and Arizona Constitutions.

Both the United States and Arizona Constitutions guarantee all persons the right to be free from cruel and unusual punishment. U.S. Const. Amend. 8; Ariz. Const. Art. 2, § 15. These provisions guarantee defendants in capital cases the right to individualized sentencing. *Eddings v. Oklahoma*, 455 U.S. 104, 105, 112, 102 S.Ct. 869, 872, 875 (1981); *Lockett v. Ohio*, 438 U.S. 586, 605, 98 S.Ct. 2954, 2965 (1978); *State v. Reeves*, 233 Ariz. 182, ¶ 16, 310 P.3d 970, ¶ 16 (2013). Discussing the weighing of an invalid aggravating factor, the United States Supreme Court has held:

> In a weighing State like Florida, there is Eighth Amendment error when the sentence weighs an "invalid" aggravating circumstance in reaching the ultimate decision to impose a death sentence. Employing an invalid aggravating factor in the weighing process "creates the possibility ... of randomness," by placing a "thumb [on] death's side of the scale," thus "creat[ing] the risk [of] treat[ing] the defendant as more deserving of the death penalty." Even when other valid aggravating factors exist, merely affirming a sentence reached by weighing an invalid aggravating factor deprives a defendant of "the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances."

Sochor v. Florida, 504 U.S. 527, 532, 112 S.Ct. 2114, 2119 (1992) (alterations original, internal citations omitted).

The same analytical reasoning requires the entire sentencing phase be held anew. Instructing a juror that *Enmund/Tison* factors and aggravating factors exist places a "thumb on death's side of the scale." Jurors are not asked to make determinations of the aggravating factors, are not given the full opportunity to evaluate the evidence supporting aggravating factors, and are not exposed to shortcomings regarding any aggravating factors which are found. Certainly, an aggravating factor may exists, but be of little weight in the scheme of evidence. Depriving jurors of the ability to make such a determination renders the aggravating factors vague and establishes a presumption towards death. Such a process deprives defendants of an individualized sentencing.

Regardless of the status of federal jurisprudence, such a construction should be employed under the Arizona Constitution. Arizona's legislative scheme informs the intent of the Arizona Constitution. Here, the legislative scheme enacting individualized sentencing under Article 2, Section 15, requires the sentencing process begin anew after a death sentence has been overruled and remanded. A.R.S. § 13-752(N). As the United States Supreme Court has noted, "early congressional enactments provide contemporaneous and weighty evidence of the Constitution's

meaning." *Printz v. U.S.*, 521 U.S. 898, 905, 117 S.Ct. 2365, 2370 (1997) (internal modifications and quotation marks omitted). Here, the legislative history of A.R.S. § 13-752 is pertinent to understanding how cruel and unusual punishment should be construed under Arizona's Constitution.

In the wake of *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002), the Arizona legislature drastically changed A.R.S. § 13-703.01 (2002). The legislature expressly noted the legislation was in response to *Ring* in the Intent section. In this sense, the legislative enactments in 2002 constituted a contemporaneous interpretation of Article 2, § 15 of Arizona's Constitution post-*Ring*. Subsection (N) expressly provided, "If the sentence of a person who was sentenced to death is overturned, the person shall be resentenced pursuant to this section by a jury that is specifically impaneled for this purpose as if the original sentencing had not occurred." A.R.S. § 13-703.01(N). Thus, the legislation interpreted Article 2, § 15 as requiring a new individualized sentencing proceeding after appellate proceedings overturned a death sentence. This interpretation ensured jurors are always empowered to hear evidence of *Enmund/Tison* factors, aggravating factors, and mitigating factors.

Moreover, the trial court violated Lynch's rights under the Eighth Amendment and Article 2, § 15, when the trial court limited Lynch's ability to offer evidence in mitigation, specifically, the guilty verdict. The Supreme Court has expressly held that

a sentence must be able to consider as mitigation, "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964-65 (1978). The Supreme Court later relied upon "[t]he absence of direct proof that the defendant intended to cause the death of the victim" and "a defendant's comparatively minor role in the offense" as relevant mitigating factors which must be considered under the Eighth Amendment. *Id.* at 608, 2966-67.

Here, the offered exhibit, the guilt phase verdict form, went to the nature of the conviction and "[t]he absence of direct proof that the defendant intended to cause the death of the victim[.]" The prosecutor took advantage of the trial court's ruling and repeatedly argued Lynch had, in fact, personally committed the murder. *See* RT 8/9/2012, 47 (arguing Lynch "took a knife and slashed a helpless individual's throat"); 48 (arguing Lynch "slash[ed] J.P 's throat" and "DNA evidence will and did prove" Lynch personally committed the murder (emphasis added)); 56 (arguing there is "no doubt" Lynch personally committed the murder in light of DNA evidence); 61 (arguing Lynch was "the person that took the knife" and "the person that cut the throat"); 80 (arguing Lynch's conviction for first degree murder was not "subject to debate"). While the conviction itself may not have been subject to debate, the circumstances of the murder are certainly relevant as mitigation under *Lockett*. The

prosecutor never convinced a unanimous jury that Lynch personally committed the murder. The proffered evidence would have assisted Lynch in responding to the prosecutor's repeated arguments that Lynch had personally committed the murder and insinuation that disagreement was impermissible.

4. The limitations prejudiced Lynch.

The procedural history of this case is telling regarding prejudice. The State had alleged, in effect, two aggravating factors: (1) the offense was committed with the expectation of pecuniary gain and (2) the offense was committed in an especially cruel, heinous or depraved manner. I. 62. During the first trial, the trial court improperly split the (F)(6) aggravator into three separate prongs. The jury unanimously found the State proved the cruelty prong and heinousness prong beyond a reasonable doubt. I. 310; I. 323. The jury was not able to reach a unanimous decision on the depravity prong. I. 310; I. 323. Additionally, the jury was not able to reach a unanimous decision regarding the pecuniary gain aggravator. I. 310; I. 323.

In the second trial, the State received a second opportunity to prove the depravity prong and the pecuniary gain aggravating factor. *See* I. 409 (trial court ruling State permitted to retry aggravators). At this point, the State was able to prove pecuniary gain and depravity to the jury. I. 451; I. 456.

That the first jury hung on the aggravating factor of pecuniary gain indicates the weight of evidence in favor of the aggravating factor was not overwhelming. *E.g. Padgett v. State*, 590 P.2d 432, 434-35 (Alaska 1979) ("We are unable to declare [that error was harmless beyond a reasonable doubt] in this case. The hung jury, in the first trial, was an indication that the case for the prosecution was not overwhelming."); *Cobb v. State*, 283 Ga. 388, 392, 658 S.E.2d 750, 753 (Ga. 2008) ("In the latter regard, the dissent fails to acknowledge that Cobb's first two trials resulted in hung juries, and that this Court has previously held that prior hung juries are a factor supporting a finding of harmful error."). Here, Lynch was sentenced by a jury which was told there was evidence establishing the aggravating factor of pecuniary gain beyond a reasonable doubt. The jury was then forced to consider the weight of that aggravating factor even though that jury may never have found the aggravating factor. Moreover, the jury could have found the State's evidence supporting the (F)(6) aggravating factor unconvincing, thereby compounding the error even further.

Additionally, the trial court's ruling that Lynch could not use the guilty verdict as mitigation evidence prejudiced Lynch. Foremost, Lynch was left unable to present evidence that might have represented a reason to provide leniency. The jury was told Lynch was eligible for the death penalty and that certain aggravating factors existed. This carries the reasonable presumption that unanimous verdicts supported these

factors. However, such a presumption would be unreasonable in this case. As indicated above, the jury which decided *Enmund/Tison* issues was not unanimously convinced that Lynch personally killed, or even intended the death of, the victim. Compounding this error, the prosecutor then assured the jury Lynch had personally committed the murder in closing arguments. *See* RT 8/9/2012, 48. This is more fully addressed in the Prosecutorial Misconduct argument.

ARGUMENT 3

THE TRIAL COURT VIOLATED LYNCH'S RIGHTS WHEN THE COURT IMPROPERLY REFUSED TO INSTRUCT THE JURY ACCORDING TO *SIMMONS V. SOUTH CAROLINA*.[14]

Standard of Review:

Appellate Courts "review *de novo* whether the jurors were properly instructed." *State v. Nelson*, 229 Ariz. 180, ¶ 21, 273 P.3d 632, ¶ 21 (2012) (internal quotation marks omitted) (quoting *State v. Dann*, 220 Ariz. 351, ¶ 51, 207 P.3d 604, ¶ 51 (2009). Alleged constitutional violations are also reviewed *de novo*. *State v. McGill*, 213 Ariz. 147, ¶ 45, 140 P.3d 930, ¶ 45 (2006).

Factual Background:

On March 2, 2012, Lynch filed Defendant's Waiver of Right to be Considered for Release-Eligible Sentence and Motion for Jury Instruction Regarding Release Ineligibility (*Simmons* Instruction). I. 650. Within this Waiver Lynch "waive[d] his statutory right to be considered for a release-eligible sentence pursuant to A.R.S. §§ 13-751 and 13-752(Q) ...." *Id.* at 1. Lynch also requested the court instruct the jury:

> Your decision is not a recommendation. Your decision will be binding. If your verdict is that Mr. Lynch should be

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[14] *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187 (1994) (plurality opinion).

> sentenced to death, he will be sentenced to death. If your verdict is that Mr. Lynch should be sentenced to life he will not be sentenced to death and the court will sentence him to natural life which means Mr. Lynch would never be released from prison for his entire life.

Id. at 9. The State objected on March 16, 2012. I. 662. The State relied primarily upon *State v. Dann*, 220 Ariz. 351, 207 P.3d 604 (2009), to argue such a waiver and instruction was improper. I. 662 at 3. The trial court briefly addressed the issue on April 6, 2012, but neither party presented additional argument. RT 4/6/2012, 6. On April 20, 2012, the trial court ruled on the requested waiver and instruction. I. 684. The trial court denied the request, relying primarily upon *Dann*. *Id.* at 5-6.

Discussion:

The trial court's decision violated Lynch's Due Process right and ability to present mitigation in two manners. The trial court should have instructed the jury according to *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187 (1994) (plurality opinion), regardless of Lynch's waiver because Arizona law prohibits parole.

1. A *Simmons* instruction is required when future dangerousness is at issue and a defendant is not eligible for parole.

In *Simmons v. South Carolina*, the United States Supreme Court considered a defendant's request that the jury be instructed regarding his ineligibility for parole if

sentenced to life imprisonment. 512 U.S. 154, 156, 114 S.Ct. 2187, 2190 (1994). The analysis began with the recognition that Simmons was ineligible for parole under South Carolina law. *Id.* During trial, the State urged for the death penalty in part because of future dangerousness. *Id.* at 157, 2190. The Court held, "In assessing future dangerousness, the actual duration of the defendant's prison sentence is indisputably relevant." *Id.* at 163, 2194. "Because truthful information of parole ineligibility allows the defendant to 'deny or explain' the showing of future dangerousness, due process plainly requires that he be allowed to bring it to the jury's attention by way of argument by defense counsel or an instruction from the court." *Id.* at 169, 2196.

A *Simmons* instruction is appropriate even where future dangerousness is "a logical inference from the evidence" or "injected into the case" by the prosecutor. *Kelly v. South Carolina*, 534 U.S. 246, 252-53, 122 S.Ct. 726, 731 (2002); *see also State v. Garcia*, 224 Ariz. 1, ¶ 76, 226 P.3d 370, ¶ 76 (citing *Kelly*).

This Court has a steady history of declining *Simmons* instructions. In *State v. Cruz*, this Court distinguished *Simmons* because, "No state law would have prohibited Cruz's release on parole after serving twenty-five years, had he been given a life sentence." 218 Ariz. 149, ¶ 42, 181 P.3d 196, ¶ 42 (2008). This Court also ruled

evidence offered regarding how the clemency board would deal with Cruz's case could "have been too speculative to assist the jury." *Id.* at ¶ 45.

One year later, in *State v. Dann*, this Court found a defendant could not waive the right to parole because a defendant "may not 'presentence' himself." 220 Ariz. 351, ¶ 124, 207 P.3d 604, ¶ 124 (2009). "Moreover, only speculation supports the notion that Dann's attempted waiver would have any effect on a future decision of the Arizona Board of Executive Clemency." *Id.*

In *State v. Garcia*, this Court distinguished *Simmons* because, "Garcia was not technically ineligible for parole" and "the State did not emphasize Garcia's future dangerousness." 224 Ariz. 1, ¶ 77, 226 P.3d 370, ¶ 77 (2010).

This Court decided *State v. Hargrave*, the same year. 225 Ariz. 1, 234 P.3d 569 (2010). In *Hargrave* this Court distinguished *Simmons* on the grounds that, "Hargrave was eligible for release after twenty-five years." *Id.* at ¶ 53.

Similarly, this Court distinguished *Simmons* because of release eligibility in *State v. Chappell*, 225 Ariz. 229, ¶ 43, 236 P.3d 1176, ¶ 43 (2010).

This Court reached a similar distinction in *State v. Hardy*, 230 Ariz. 281, 283 P.3d 12 (2012). This Court noted *Simmons* instructions are unnecessary when state law does not prohibit a defendant's release on parole. *Id.* at ¶ 58. Hardy was

sentenced under A.R.S. § 13-751, which "provides for the possibility of a life sentence with release after twenty-five years." *Id.*

Without citation to *Simmons*, this Court briefly addressed the issue in *State v. Cota*, 229 Ariz. 136, ¶¶ 75-76, 272 P.3d 1027, ¶¶ 75-76 (2012). Interestingly, this Court dismissed Cota's argument, stating, "This argument [that Cota was not eligible for parole under A.R.S. § 41-1604.09(I)], however, conflates parole and release." *Id.* at ¶ 75. This Court expressly noted Cota was eligible for other forms of release, including clemency. *Id.*

The issue was summarily addressed in *State v. Hausner* as an issue preserved for federal review. 230 Ariz. 60, 90 Appx. 14, 280 P.3d 604, 634 Appx. 14 (2012).

In *State v. Boyston*, this Court distinguished the requested instruction because the "proffered instruction referred more broadly to any form of release or commutation of sentence ...." 231 Ariz. 539, ¶ 68, 298 P.3d 887, ¶ 68 (2013).

Finally, this Court recently addressed *Simmons* in *State v. Benson*, 232 Ariz. 452, ¶ 56, 307 P.3d 19, ¶ 56 (2013). This Court distinguished *Simmons* because "Arizona law does not make Benson ineligible for parole." *Id.*

2. Future Dangerousness was at issue in this case.

Unlike *Garcia*, future dangerousness was at issue in this case. Throughout trial the prosecutor argued one of the reasons Lynch should be sentenced to death was

because of the risk of future dangerousness. During cross examination of James Aiken the prosecutor implied Lynch might escape or assault a correction officer. RT 7/23/2012, 46-48. During closing arguments the prosecutor commented on Lynch's misbehavior in prison. RT 8/9/2012, 77. The prosecutor further attacked the reliability of James Aiken's opinion that Lynch did not pose a risk while in prison. *Id.* at 78. These arguments sufficiently raised the issue of future dangerousness under *Kelly v. South Carolina*, 534 U.S. 246, 122 S.Ct. 726.

3. Lynch is not eligible for parole; parole has been abolished.

Unlike nearly every case addressed by this Court, Lynch was not eligible for parole because Arizona law prohibits parole as a sentence. Certainly, the word parole is referenced in A.R.S. §§ 13-751 and 13-752. These statutes do not make parole an actual sentencing option. Parole was abolished in Arizona in 1994. *See* A.R.S. § 41-1604.09. Under this statute, parole is only available "to persons who commit[ted] felony offenses before January 1, 1994." A.R.S. § 41-1604.09(I); *see also State v. Rosario*, 195 Ariz. 264, ¶ 26, 987 P.2d 226, ¶ 26 (App. 1999) ("The Arizona legislature enacted laws effective January 1, 1994, eliminating the possibility of parole for crimes committed after that date. Because Rosario committed his crimes in March and May 1994, he is not eligible for parole ...."(internal citation omitted)). Lynch

committed this offense in 2001. Thus, Lynch is not, and never has been, eligible for parole.

4. The availability of executive clemency does not alter the requirements of *Simmons*.

Remaining forms of release—the only forms of release available to Lynch—are not of sufficient constitutional import to deviate from the rule announced in *Simmons*. This Court has previously pointed to eligibility for "release" in a more general sense when affirming sentences. *E.g. Dann*, 220 Ariz. 351, ¶ 124, 207 P.3d 604, ¶ 124; *Hargrave*, 225 Ariz. 1, ¶ 53, 234 P.3d 569, ¶ 53; *Chappell*, 225 Ariz. 229, ¶ 43, 236 P.3d 1176, ¶ 43; *Hardy*, 230 Ariz. 281, ¶ 58, 283 P.3d 12, ¶ 58. This Court most directly addressed the issue in *Cota*, 229 Ariz. 136, ¶ 75, 272 P.3d 1027, ¶ 75. In *Cota* this Court criticized the defense for conflating parole and clemency. *Id.* This precise logical problem—that release and parole are not the same—is what militates a different conclusion in this case. Unlike parole, clemency does not carry constitutional weight.

The United States Supreme Court squarely addressed the difference between parole and clemency in *Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001 (1983). In *Solem* a defendant had been sentenced to life for uttering a fraudulent check. *Id.* at 281-83, 3005-06. South Dakota had legislatively made parole unavailable to any

person serving a life sentence. *Id.* at 282, 3005. The only method for release was commutation. *Id.* at 282, 3005-06. After the defendant applied for commutation and was denied, the defendant initiated habeas proceedings. *Id.* at 283, 3006. The Eighth Circuit reversed the sentence, finding it "grossly disproportionate to the nature of the offense." *Id.* at 283-84, 3006. The Supreme Court affirmed the decision of the Eighth Circuit. *Id.* at 284, 3006.

The Supreme Court expressly discussed parole and commutation:

> As a matter of law, parole and commutation are different concepts, despite some surface similarities. Parole is a regular part of the rehabilitative process. Assuming good behavior, it is the normal expectation in the vast majority of cases. The law generally specifies when a prisoner will be eligible to be considered for parole, and details the standards and procedures applicable at that time. Thus it is possible to predict, at least to some extent, when parole might be granted. Commutation, on the other hand, is an *ad hoc* exercise of executive clemency. A Governor may commute a sentence at any time for any reason without reference to any standards.
>
> We explicitly have recognized the distinction between parole and commutation in our prior cases. Writing on behalf of the *Morrissey* Court, for example, Chief Justice Burger contrasted the two possibilities: "Rather than being an *ad hoc* exercise of clemency, parole is an established variation on imprisonment of convicted criminals." In *Dumschat*, the Chief Justice similarly explained that "there is a vast difference between a denial of parole ... and a state's refusal to commute a lawful sentence."

Id. at 300-01, 3015 (internal citations omitted). The Court continued:

> The possibility of commutation is nothing more than a hope for "an *ad hoc* exercise of clemency." It is little different from the possibility of executive clemency that exists in every case in which a defendant challenges his sentence under the Eighth Amendment. Recognition of such a bare possibility would make judicial review under the Eighth Amendment meaningless.

Id. at 303, 3016. Because the possibility of commutation was constitutionally meaningless, the Court agreed the sentence was grossly disproportionate and violated the Eighth Amendment. *Id.* at 303, 3016-17

Further demonstrating the constitutional insignificance of alternative forms of release, the Supreme Court in *Simmons* expressly noted:

> In this regard [that Simmons was not entitled to an instruction regarding parole ineligibility because it is inherently misleading], the State emphasizes that no statute prohibits petitioner's eventual release into society. While this technically may be true, state regulations unambiguously prohibit work-release and virtually all other furloughs for inmates who are ineligible for parole. As for pardons, the statute itself provides that they are available only in "the most extraordinary circumstances."

Simmons, 512 U.S. at 166, fn.6, 114 S.Ct. at 2195, fn.6 (internal citations omitted). The Court continued:

> Essentially, they argue that because future exigencies such as legislative reform, commutation, clemency, and escape might allow petitioner to be released into society, petitioner

> was not entitled to inform the jury that he is parole ineligible. Insofar as this argument is targeted at the specific wording of the instruction petitioner requested, the argument is misplaced. Petitioner's requested instruction ("If ... you recommend that [the defendant] be sentenced to life imprisonment, he actually will be sentenced to imprisonment in the state penitentiary for the balance of his natural life," App. 162) was proposed only after the trial court ruled that South Carolina law prohibited a plain-language instruction that petitioner was ineligible for parole under state law. To the extent that the State opposes even a simple parole-ineligibility instruction because of hypothetical future developments, the argument has little force. Respondent admits that an instruction informing the jury that petitioner is ineligible for parole is legally accurate. Certainly, such an instruction is more accurate than no instruction at all, which leaves the jury to speculate whether "life imprisonment" means life without parole or something else.

Id. at 166, 2195.

5. The Eighth Amendment and Article 2, § 15, provide further support for a *Simmons* instruction.

In *Simmons* the Supreme Court limited its decision to consideration of the Due Process clause. The Court "express[ed] no opinion on the question whether the result we reach today is also compelled by the Eighth Amendment." *Id.* at 162 fn.4, 2193 fn.4. Justice Souter, in concurrence, however, linked the decision to the Eighth Amendment's requirement "for reliability in the determination that death is the appropriate punishment in a specific case." *Id.* at 172, 2198 (Souter, J., concurring)

(quoting *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991 (1976)). The United States and Arizona Constitutions each independently guarantee the right to be free from cruel and unusual punishment. U.S. Const. Amend. 8; Ariz. Const. Art. 2, § 15. These provisions guarantee defendants in capital cases the right to individualized sentencing. *Eddings v. Oklahoma*, 455 U.S. 104, 105, 112, 102 S.Ct. 869, 872, 875 (1982); *Lockett v. Ohio*, 438 U.S. 586, 605, 98 S.Ct. 2954, 2965 (1978); *State v. Reeves*, 233 Ariz. 182, ¶ 16, 310 P.3d 970, ¶ 16 (2013). The trial court's failure to instruct the jury pursuant to *Simmons* not only violated Lynch's Due Process rights; the failure also violated Lynch's right to an individualized sentence under the Eighth Amendment and Article 2, § 15.

6. The instructions did not remedy error.

Unlike many of the cases which have preceded this one, the instructions in this case do not remedy the issue. The preliminary instruction in this case read:

> ... Under Arizona law, every person guilty of first degree murder shall be punished by death, or imprisonment for life without the possibility of release from prison, or imprisonment for life with the possibility of release after 25 years.
>
> In this hearing, each juror will decide if mitigating circumstances exist and then, as a jury, you will decide whether to sentence the Defendant to life imprisonment or death. If the sentence is life imprisonment, then the court will sentence to either life imprisonment without the

> possibility of release from prison, or life imprisonment with the possibility of release from prison after 25 years.
>
> "Life without the possibility of release from prison" means exactly what it says. This sentence means the Defendant will never be eligible to be released from prison for any reason for the rest of his life. He will not be eligible for parole, work furlough, work release, or release from confinement on any basis, and his sentence cannot be commuted.

I. 714. By defining the possibility of release as including parole, the trial court's instruction misled the jury. The jury was told Lynch was eligible for parole when Lynch is not. Nothing in the final jury instructions corrected this misstatement. I. 779.

Conclusion:

Lynch was not eligible for parole. To the extent other forms of release exist, the other forms of release are constitutionally insignificant. Regardless of Lynch's waiver, the trial court should have instructed the jury according to *Simmons*.

ARGUMENT 4

LYNCH WAS DEPRIVED OF HIS RIGHT TO A PROPERLY CONSTITUTED JURY WHEN THE TRIAL COURT FAILED TO ACCURATELY FOLLOW THE PROCEDURE SET FORTH IN *BATSON V. KENTUCKY*.[15] AS A RESULT OF THE TRIAL COURT'S FAILURE, THE STATE WAS PERMITTED TO STRIKE TWO JURORS WITHOUT PROVIDING SATISFACTORY RACE-NEUTRAL REASONS FOR THE STRIKES.

Standard of Review:

Claims raised pursuant to *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986) are reviewed for clear error. *State v. Hardy*, 230 Ariz. 281, ¶ 11, 283 P.3d 12, ¶ 11 (2012). A trial court's findings are clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Merryweather v. Pendleton*, 91 Ariz. 334, 338, 372 P.2d 335, 339 (1962). Additionally, "a finding of a trial court is clearly erroneous where it is induced by an erroneous view of the law." *Id.* at 339, 338.

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[15] *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986).

Factual Background:

Immediately after both parties exercised peremptory challenges, the Defense challenged five of the prosecutor's strikes in accordance with *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986). RT 7/17/2012, 10. The challenge was raised because half of the State's ten peremptory strikes were used to dismiss individuals who self-identified as Hispanic: panel members 8, 32, 34, 49 and 255. *Id.* at 10, 12.

The State first addressed juror 255, indicating the juror's philosophical opposition to the death penalty was the reason for the strike. *Id.* at 10-11. The State struck juror 49 because the juror had previously been on a jury panel that resulted in a hung jury. *Id.* at 11-12. The State struck juror 8 because juror 8 may have identified with mitigation in light of her feelings about how her brother was treated when he was convicted of child abuse. *Id.* at 14-15.

Regarding juror 34, the State argued:

> 34, you will be able to see, is wearing shorts today. On the left leg and on the right leg he's got tattoos. On one of his arms, I believe the left arm, he has a number of tattoos on him. He has a lot of tattoos on him and one of the things that you will be hearing and I believe the date was 2003, the defendant admitted to his psychologist, Jolie Brams, who is going to testify, that this hepatitis C, which is one of the mitigating circumstances, was contracted in the jail and apparently it was, according to the defendant, he was either giving tattoos and receiving tattoos, but in any event, it involved a tattoo that he received in jail in 2003.

> Again, there are -- is no other individual on this panel that has this many tattoos that are visible. I do not want anybody on this panel that can identify with the defendant, again, whether -- if it were a Caucasian person, if it were Native American, I would not want anybody with all of these tattoos, especially since one of their strongest mitigating circumstances is that he contracted hepatitis C while in custody in 2003.

Id. at 12-13.

Explaining the reason he struck juror 32, the State argued:

> Number 32, and I'm going to describe him. I don't mean any disr spect to him. I know he's not in the courtroom but I do want the record to reflect what we all saw. It would not be an exaggeration to say that his facial hair resembles ZZ Top and being unkind I would say it looks like a billy goat.
>
> Additionally, his hair in the back is a very long ponytail and it looks like Jerry Garcia, if we're going to go with that sort of analogy. There is no way that anybody that looks like ZZ Top or Jerry Garcia, in my view, whether they are white or whether they are not white should be serving, and I would have stricken anybody with that type of grooming.
>
> I would note that one of the other people that I asked you to strike for cause was number 299. If you remember, he was here yesterday. He also had long facial hair and facial hair. That was part of the reason that I asked that he be stricken. I just do not want somebody with long hair or facial hair and he happened to be white. So that is a race neutral reason.

Id. at 13-14.

Immediately after the State offered its reasons for striking the jurors, the trial court found all of the State's reasons were race neutral and permitted the strikes. *Id.* at 15. After this ruling, the Defense interjected and argued the reasons provided for jurors 32 and 34 were not satisfactory. *Id.* Without further discussion, the trial court moved on. *Id.*

Discussion:

In *Batson v. Kentucky* the United States Supreme Court held the Equal Protection Clause is violated when the State exercises peremptory strikes in a discriminatory manner. 476 U.S. 79, 85-86, 106 S.C. 1712, 1716-17 (1986). The right to a jury that represents a fair cross section of society extends to all defendants, regardless of whether the defendant is a member of a minority group. *Holland v. Illinois*, 493 U.S. 747, 476-77, 110 S.Ct. 803, 805-06 (1990). To evaluate whether a prosecutor struck a juror for discriminatory reasons, courts must engage in a three-step process:

> First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race. Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. Third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

Miller-El v. Cockrell, 537 U.S. 322, 328-29, 123 S.Ct. 1029, 1035 (2003) (internal citations omitted); *accord State v. Hardy*, 230 Ariz. 281, ¶ 12, 283 P.3d 12, ¶ 12 (2012). At the second step, "the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Hernandez v. New York*, 500 U.S. 352, 360, 111 S.Ct. 1859, 1866 (1991). The second step "does not demand an explanation that is persuasive, or even plausible." *Purkett v. Elem*, 514 U.S. 765, 767-68, 115 S.Ct. 1769, 1771 (1995). Thus, even "implausible or fantastic justifications" satisfy the second step. *Id.* at 768, 1771. The third step is when the trial court actually evaluates the proffered reasons. *Snyder v. Louisiana*, 552 U.S. 472, 477, 128 S.Ct. 1203, 1207 (2008). The proffer of a pretextual reason for striking a juror "naturally gives rise to an inference of discriminatory intent." *Id.* at 485, 1212.

Here, the trial court erred when it failed to adequately conduct the analysis required by *Batson* and its progeny. Specifically, the trial court refused to conduct the third step of the analysis.

The Seventh Circuit dealt with an identical scenario in *U.S. v. Rutledge*, 648 F.3d 555 (7th Cir. 2011). In *Rutledge* the trial court denied the *Batson* challenge "after saying that the government's reasons were 'nonracial,' but without making any finding on the prosecutor's credibility." *Id.* at 557. The Seventh Circuit refused to

presume a justification was credible "simply because the district judge ultimately denied the challenge." *Id.* (quoting *U.S. v. McMath*, 559 F.3d 657, 666 (7th Cir. 2009)). The Seventh Circuit noted that normally deference would be given to the trial court. *Id.* at 558. "Nevertheless, if there is nothing in the record reflecting the trial court's decision, then there is nothing to which we can defer." *Id.* at 559. The Seventh Circuit concluded an evidentiary gap existed which required remand. *Id.* at 560.

The Sixth Circuit addressed the same question in *U.S. v. McAllister*, 693 F.3d 572 (6th Cir. 2012). In *McAllister* the prosecutor struck the only two African American members of the jury panel and the defense objected. *Id.* at 576. The trial court did not require the government to explain the decision to strike one of the jurors because the juror had been convicted of a felony related to dishonesty, but requested an explanation for the remaining juror. *Id.* at 576-77 After the prosecutor proffered the reasons for the strike the Court simply responded, "All right." *Id.* The Seventh Circuit ruled the reasons for the strike, present unemployment and nature of past employment, were race neutral. *Id.* at 579. However, regarding the third step of the analysis, the Court ruled:

> At the third step of the *Batson* inquiry, the trial court has a duty to assess whether the opponent of the strike has met its burden to prove purposeful discrimination. The judge must

> assess the plausibility of the proponent's race-neutral reason in light of all evidence with a bearing on it. We have held that the preceding command "places an affirmative duty on the district court to examine relevant evidence that is easily accessible." The trial judge must consult "all of the circumstances that bear upon the issue of racial animosity." The trial court may neither "short circuit the [*Batson* analysis] by consolidating any two of the steps," nor "simply accept the prosecution's explanation on its face[.]" Rather, the trial judge has a duty to determine whether purposeful discrimination has been established.

Id. at 580 (internal citations omitted). The Court further noted, "Because the primary defense to pretext based violations of *Batson* is the district court's ability to assess the credibility of an attorney's representations, it is critical that the district court independently assess the proffered justification." *Id.* (quoting *McCurdy v. Montgomery Cnty.*, 240 F.3d 512, 521 (6th Cir. 2001)). The Court concluded:

> In this case, the district court improperly truncated the *Batson* analysis and failed to explicitly delineate each step. The district court did exactly what this court has repeatedly instructed against doing: perfunctorily accepting the prosecutor's race-neutral explanation and combining steps two and three. The district court did not consult with the defense counsel to hear a response to the Government's race-neutral explanation, nor did it engage the prosecution to independently assess the plausibility of its argument. Gauging from the district court's two-word analysis and finding—"all right"—it is doubtful that the district court consulted all circumstances that bear upon the issue of racial animosity. We have no way of reviewing the district court's reasoning for rejecting McAllister's *Batson*

> challenge. Thus, the district court did not conduct a constitutionally sufficient *Batson* analysis.

Id. at 581 (citations omitted). Notably, the Sixth Circuit reached this conclusion despite the fact that the defense attorney did not object at the time the trial court improperly ruled. *Id.* at 582. The Sixth Circuit remanded the case to the district court to make explicit findings. *Id.*

The Third Circuit addressed the issue in *Coombs v. Diguglielmo*, 616 F.3d 255 (3d Cir. 2010). In *Coombs* the prosecutor used five of six peremptory strikes to remove African American panel-members. *Id.* at 258. The prosecutor offered reasons, including that the prosecutor "just didn't like" one of the jurors and went with a hunch. *Id.* "The court's only response was: 'Let's go. Are we ready to? Do we have the bills?'" *Id.* When the defense asked if the court was denying the motion the trial, court responded, "Yes." *Id.* On review, the Third Circuit concluded, "the court effectively omitted the third step of the *Batson* inquiry by unreasonably limiting the defendant's opportunity to prove that the prosecutor's proffered reasons for striking Black jurors were pretextual ...." *Id.* at 263. The Court was also troubled by the fact that the trial court failed to examine the prosecutor's statements that the strike was because the prosecutor "just didn't like" the juror. *Id.* Because the state trial court

had failed to correctly apply *Batson*, the Third Circuit remanded the case to the federal district court for an evidentiary hearing. *Id.* at 265.

The Ninth Circuit addressed the issue in *Green v. LaMarque*, 532 F.3d 1028 (9th Cir. 2008). In *Green* the prosecutor used peremptory strikes on all six African American panelists. *Id.* at 1029. The trial court failed to engage in the third step of the *Batson* analysis. *Id.* at 1030. The Ninth Circuit found the perfunctory approval by the California Court of Appeals was improper as it failed to address the third prong of the analysis. *Id.* at 1031. Notably, the Ninth Circuit elected to engage in a *de novo* review on the third prong, rather than remand to the state courts to determine the third step. *Id.* Engaging in this *de novo* review, the Ninth Circuit concluded the California Court of Appeals' approval of the strikes was unreasonable. *Id.* The Ninth Circuit evaluated the reasons proffered by the prosecutor and concluded the prosecutor's strikes were racially motivated. *Id.* at 1031-33. Accordingly, the Ninth Circuit reversed the conviction and ordered a new trial. *Id.* at 1033. The independent review approach used by the Ninth Circuit was extended in April of this year in *Jamerson v. Runnels*, 713 F.3d 1218, 1225 (9th Cir. 2013).

A number of State courts have reached the same conclusion: *Jones v. State*, 938 A.2d 626, 633 (Del. 2007) (remanding case where trial court failed to perform third step of analysis); *People v. Davis*, 231 Ill.2d 349, 366-69, 899 N.E.2d 238, 248-50 (Ill.

2008) (remanding for hearing where trial court failed to conduct third stage analysis); *State v. Pona*, 926 A.2d 592, 608 (R.I. 2007) (creating a prospective rule requiring trial courts to place *Batson* rulings on the record); *Edmonds v. State*, 372 Md. 314, 338-39, 812 A.2d 1034, 1048 (Md. 2002) (finding trial court's failure to clearly conduct third step analysis was *Batson* violation).

Here, the trial court failed to conduct the third step of the *Batson* analysis. Rather, the trial court merely found the prosecutor had provided race neutral reasons. RT 7/17/2012, 15. The trial court moved on based solely upon the race neutral reasons and provided no effect to the third prong under *Batson*. When the Defense, in essence, requested the trial court to engage in the evaluation under the third step, the trial court simply moved on. *Id.* The trial court failed to follow the simple guidelines set forth by the United States Supreme Court when the trial court failed to evaluate the credibility of the prosecutor's reason for the strikes.

Moreover, the circumstances of the prosecutor's strikes provide substantial indicia supporting Lynch's *Batson* motion. A prosecutor's failure to voir dire prospective jurors on the issues, later relied upon to support strikes, indicates a discriminatory intent. *Miller-El v. Dretke*, 545 U.S. 231, 244-45, 2327-28 (2005) (evaluating whether prosecutor questioned jurors differently based upon race); *Smith v. Cain*, 708 F.3d 628, 636 (5th Cir. 2013) ("[I]f the State asserts that it was concerned

about a particular characteristic but did not engage in meaningful voir dire examination on that subject, then the State's failure to question the juror on that topic is some evidence that the asserted reason was a pretext for discrimination." (quoting *Reed v. Quarterman*, 555 F.3d 364, 376 (5th Cir. 2009)); *Parker v. Allen*, 565 F.3d 1258, 1271 (11th Cir. 2009) ("Questions arise regarding the credibility of the explanation and the possibility that the explanation is pretextual ... when the prosecution fails to engage in a meaningful voir dire examination on a subject that it alleges it is concerned ...."). This Court employed similar reasoning in *State v. Cruz*, 175 Ariz. 395, 400, 857 P.2d 1249, 1254 (1993). In *Cruz* this Court found a prosecutor's race-neutral reason for a strike unpersuasive because the record did not support the prosecutor's subjective feelings about the juror. *Id.* Accordingly, this Court reversed the convictions. *Id.* at 401, 1255.

Here, the prosecutor never questioned any jury panel regarding tattoos and never questioned any jury panel about hair styles. Jurors 32 and 34 were both present for the afternoon panel on July 10, 2012. I. 709; RT 7/10/2012, 117. The prosecutor availed himself of the opportunity to conduct voir dire of the panel. RT 7/10/2012, 130. The prosecutor directly questioned jurors 32 and 34. *Id.* at 151-53. Mr. Martinez did not question either of the jurors on the issues he later relied upon as bases for his peremptory strikes. *See Id.* The prosecutor had another opportunity to

voir dire juror 32 outside the presence of other jurors. *Id.* at 222. Again, the prosecutor did not ask juror 32 about the juror's appearance (the proffered justification). The prosecutor did not inquire if the appearance reflected political or ideological viewpoints or any other beliefs generally. Mr. Martinez had an opportunity to question juror 34 a second time. *Id.* at 230. The prosecutor did not take this opportunity though. *Id.* The prosecutor did not move to strike either of the jurors for cause. *Id.* at 231. The prosecutor did not raise any issues on July 17, 2012, when asked if he passed the panel for cause; the prosecutor did not request an additional opportunity to voir dire jurors 32 or 34. RT 7/17/2012, 6. Seeing a juror with exposed tattoos did not prompt the prosecutor to request an opportunity to inquire of the remaining panel regarding tattoos. *See Id.* The prosecutor's failure to voir dire the prospective jurors or the jury panel regarding the prosecutor's concerns indicates the proffered reasons were merely pretextual.

Conclusion:

When a *Batson* challenge is made, the trial court must engage in three steps. The defense must establish a *prima facie* case of discrimination, the prosecutor must offer a race neutral reason, and the trial court must evaluate the reason offered by the State to assess whether the proffered reason is pretextual. Here, the trial court failed to conduct the third step. The trial court affirmed the State's peremptory strikes

merely upon a finding that the State had offered a race neutral reason. The State's ability to provide a race neutral reason is not the test. Rather, the trial court must actually evaluate the reason. The trial court's refusal to conduct such evaluation violated Lynch's right to a properly constituted jury. Accordingly, this Court should reverse Lynch's sentence.

ARGUMENT 5

THE TRIAL COURT INCORRECTLY DENIED LYNCH'S MOTION TO STRIKE JUROR 5 WHEN JUROR 5 POSSESSED PERSONAL KNOWLEDGE FROM OUTSIDE THE RECORD REGARDING THE EXPERIENCE AND REPUTATION OF AN EXPERT WITNESS.

Standard of Review:

Alleged constitutional violations are reviewed *de novo*. *State v. McGill*, 213 Ariz. 147, ¶ 45, 140 P.3d 930, ¶ 45 (2006). A trial court's disposition of motions to strike jurors will be affirmed, "unless the record affirmatively shows that such a fair and impartial jury was not secured," *State v. Arnett*, 119 Ariz. 38, 50, 579 P.2d 542, 554 (1978).

Factual Background:

On July 26, 2012, the State called Dr. Vincent Honan to testify. RT 7/26/2012, 92. Dr. Honan is a gastroenterologist and was called to address the testimony previously given by Dr. Altschuler. *Id.* at 92, 109-110. Dr. Honan testified he worked at Banner Samaritan, among other hospitals. *Id.* at 96.

After Dr. Honan's testimony, juror 5 sent a letter to the trial court. *See Id.* at 144. The letter was read into the record:

> Judge O'Connor. I should tell you that I worked for Banner Health from September 2008 to May 2010. I

> worked in the medical surgical ICU at Banner Good Sam. My floor was 11C/D, which was the medical surgical unit that was responsible for caring for patients pre and post liver transplant. Not sure whether that information is important for this case, but wanted to make sure that you know as full disclosure. Thank you. Juror No. 5.

Id.; I. 780. Juror 5 had recognized Dr. Honan:

> MR. MARTINEZ: No thank you.
>
> Well, the fact that you believe that we should know that, do you believe that even though you have that experience, do you think that you still can be fair and impartial in this case?
>
> THE JUROR: Absolutely. I just wanted to make sure you knew that because Dr. Honan has taken care of patients on the 11th floor, which is A, B, C and D. I worked in C and D.
>
> However, my experience was caring for patients from another gastroenterology practice, however, I have seen Dr. Honan. I didn't recognize his name on that list but I did recognize him when he came in. But it's a teaching facility, so the docs that are really caring for the patients pre and post transplant are the surgical residents. He oversees the surgical residents. But I wanted to make sure you knew that.

RT 7/26/2012, 144-45. The defense asked about the juror's perceptions of the doctors who she had worked with:

> MR. BLIEDEN: We greatly appreciate it. What you knew of him, was it all very favorable?

> THE JUROR: Yes. I mean, I think the surgeons that work at Good Sam are excellent surgeons.
>
> * * *
>
> MR. BLIEDEN: I know you didn't work with him directly, but you were aware of his reputation in the hospital community; is that true?
>
> THE JUROR: I mean, I you're aware of a lot of the doctors that work in the hospital. But, like I said, my dealings were really the surgical residents.
>
> As far as trusting the surgical residents, if they have to consult with someone, they would consult with their supervising physician, which would be Dr. Honan or other surgeons. I just -- I don't think it's -- for me, it doesn't mean anything, but I wanted to make sure that you knew.

Id. at 146-47

The defense moved to dismiss juror 5 for cause. *Id.* at 147-49. The defense argued the juror's knowledge of Dr. Honan's reputation and prior experience was problematic and created inequity in the trial. *Id.* at 148-49. The court took the motion under advisement. *Id.* at 152.

The trial court's ruling on the motion was placed on the record on August 8, 2012. RT 8/8/2012, 3. The court ruled:

> I did review the questionnaire, and I have considered her responses to the questions that were given in open court that day, I don't find that there is a legal basis to excuse her for cause and I'm going to deny the defendant's motion.

Id. at 3-4.

At the end of the trial, juror 5 was not one of the alternates selected. RT 8/9/2012, 108. Juror 5 deliberated and was one of the jurors who decided the sentence. RT 8/16/2012, 4.

Lynch again raised this issue in his Motion for New Trial, I. 790, which the trial court denied, I. 797

Discussion:

The Sixth Amendment guarantees, "the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed ...." U.S. Const. Amend. 6. The guarantee of a jury trial is applicable to States through the Fourteenth Amendment. *Duncan v. Louisiana*, 391 U.S. 145, 148-50, 88 S.Ct. 1444, 1447-48 (1968). Arizona independently guarantees the right "to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed ..." Ariz. Const. Art. 2, § 24; *see also* Ariz. Const. Art. 2, § 23 ("The right of trial by jury shall remain inviolate."). "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of

impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642 (1961); *accord State v. Eddington*, 228 Ariz. 361, ¶ 6, 266 P.3d 1057, ¶ 6 (2011). Impartiality requires "that a jury's verdict must be based upon the evidence developed at the trial ...." *Turner v. State of Louisiana*, 379 U.S. 466, 472, 85 S.Ct. 546, 549 (1965) (internal quotation marks omitted); *accord Eddington*, 228 Ariz. 361, ¶ 8, 266 P.3d 1057, ¶ 8.

When evaluating issues related to the impartiality requirement, the United States Supreme Court has also repeatedly referred to the need for public confidence in jury verdicts. In *Powers v. Ohio* the Court stated:

> The purpose of the jury system is to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair.

Powers, 499 U.S. 400, 413, 111 S.Ct. 1364, 1372 (1991). Relying on *Powers*, the Court noted in *Georgia v. McCollum*, "Selection procedures that purposefully exclude African-Americans from juries undermine that public confidence as well they should." 505 U.S. 42, 49, 112 S.Ct. 2348, 2353-54 (1992). This principle was reiterated more recently in *Johnson v. California*:

> Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.

545 U.S. 162, 125 S.Ct. 2410 (2005) (quoting *Batson v. Kentucky*, 476 U.S. 79, 87, 106 S.Ct. 1712, 1718 (1986). Public confidence is applied more expansively than solely with racial discrimination claims. In *Press-Enterprise Co. v. Superior Court of California for Riverside*, the Court noted the importance of public confidence in the system as a reason behind public openness:

> In *Press-Enterprise I*, we summarized the holdings of prior cases, noting that openness in criminal trials, including the selection of jurors, "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system."

478 U.S. 1, 9, 106 S.Ct. 2735, 2740 (1986) (quoting *Press-Enterprise Co. v. Superior Court of California, Riverside*, 464 U.S. 501, 501, 104 S.Ct. 819, 820 (1984).

Virginia has gone so far as to rule, "public confidence in the integrity of the process is one of the elements a trial court should consider when deciding whether a juror should be struck for cause." *Barrett v. Commonwealth*, 262 Va. 823, 826-27, 553 S.E.2d 731, 733 (Va. 2001). *Barrett* dealt with a trial court's failure to strike a juror who was the brother of the victim. *Id.* at 824-25, 732. Notably, the Supreme Court of Virginia reviewed the issue on its merits even though the potential juror was dismissed pursuant to a peremptory strike by the defendant. *Id.* at 825, 732. The Court reversed the conviction and ordered a new trial because the "refusal to strike the

prospective juror for cause makes it unlikely that the public would have confidence in the judicial process." *Id.* at 827, 733.

This Court has also recognized the importance of public confidence when evaluating jury selection issues. In *State v. Eddington*, this Court noted:

> By broadly disqualifying four categories of persons from sitting on a jury for a specific case, [A.R.S.] § 21-211 serves at least three goals: (1) preserving the right to a fair trial by impartial jurors, (2) ensuring that jurors derive their knowledge about the case solely from information presented at trial to the jurors collectively, and (3) protecting the appearance of fairness, which helps instill public confidence in the judicial system.

228 Ariz. 361, ¶ 8, 266 P.3d 1057, ¶ 8 (2011).

Here, the trial court's refusal to strike juror 5, and the fact that juror 5 ultimately deliberated and participated in the imposition of sentence, was error because (1) the court's decision violated A.R.S. § 21-211, (2) juror 5 possessed specific knowledge that was not derived solely from the information presented at trial, and (3) the participation of juror 5 undermines public confidence in the equity of the present verdict.

1. Violation of A.R.S. § 21-211.

A.R.S. § 21-211 requires trial courts to strike a potential juror when that juror is a witness in the action, is "interested directly or indirectly in the matter under

investigation," is related to a party, or is "biased or prejudiced in favor of or against either of the parties." A.R.S. § 21-211. This Court has noted a juror's "interest" in a proceeding is necessarily different from bias or prejudice. *State v. Eddington*, 228 Ariz. 361, ¶ 9, 266 P.3d 1057, ¶ 9 (2011). This Court evaluated jurisprudence related to what "interest" meant in the jury selection context. *Id.* at ¶ 10. This Court cited to *Lopez v. Farmers Ins. Co.*, 177 Ariz. 371, 374, 868 P.2d 954, 957 (App. 1993) and *Salt River Valley Water Users' Ass'n v. Berry*, 31 Ariz. 39, 43-44, 250 P 356, 357 (1926) as examples of circumstances where financial interests were at play:

> In both cases, the court disqualified the prospective jurors without requiring a showing that their interest might have affected their ability to fairly and impartially deliberate. The potential for an appearance of bias sufficed to require disqualification regardless of any juror-specific finding of actual bias.

Id. An interest, however, is not limited to pecuniary issues. *Id.* at 11. Interest, "may also include a desire to see one side prevail in litigation or an alignment with or loyalty to one party or side." *Id.* Officers of the investigating agency were an example of people who would possess an interest. *Id.* "In addition to the outward appearance of an interest, a co-employee might feel pressure in judging the credibility and conduct of coworkers, a role with potential consequences for his future working relationships." *Id.* at ¶ 12 (internal quotation marks omitted).

Here, juror 5 should have been dismissed for cause because the juror had an indirect interest and because the juror became biased and preju0diced in favor of the State. While juror 5 did not, at the time of the trial, work for the same hospital, the juror had previously worked at the hospital where Dr. Honan has privileges. While it occurs, it is usually not in a person's best interest to disparage prior employers. In that sense, the juror had an interest in the dispute because another person associated with her prior employer was a disputed witness in the case.

Moreover, the trial court completely failed to consider that biases and prejudices are often unconsciously held. Regarding the interrelation of bias and cross-examination, the United States Supreme Court stated:

> Bias is a term used in the "common law of evidence" to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party. Bias may be induced by a witness' like, dislike, or fear of a party, or by the witness' self interest. Proof of bias is almost always relevant because the jury, as a finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony. The "common law of evidence" allowed the showing of bias by extrinsic evidence, while requiring the cross-examiner to "take the answer of the witness" with respect to less favored forms of impeachment.

U.S. v. Abel, 469 U.S. 45, 52, 105 S.Ct. 465, 469 (1984). The Court has also noted the "automatic, unconscious, and unintentional" nature of bias that escapes notice of the person enacting bias in the context of *Batson* challenges to peremptory strikes. *Miller-El v. Dretke*, 545 U.S. 231, 267-68, 125 S.Ct. 2317, 2340-41 (2005) (citing *Batson v. Kentucky*, 476 U.S. 79, 106, 106 S.Ct. 1712, 1728 (1986) (Marshall, J., concurring); *see also* Anthony Page, Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge, 85 B.U.L.Rev 155, 161 (2005).

This Court recognizes the danger of unconscious prejudices carries over to jurors:

> It must be remembered that an information of this kind (Receiving the Earnings of a Prostitute) charges a defendant with what is usually considered one of the most disgusting crimes morally to be found in the penal code. This very fact raises in the mind of the average decent citizen a feeling, perhaps unconscious, of revulsion against the defendant. It is, therefore, peculiarly important that no improper evidence be admitted which would tend to increase that unconscious prejudice.

State v. Johnson, 116 Ariz. 399, 400, 569 P.2d 829, 830 (1977) (quoting *State v. Green*, 60 Ariz. 63, 68, 131 P.2d 411, 413 (1942)). The risk that a juror's unconscious prejudice would lead to conviction is the precise reason the Rules of Evidence prohibit the introduction of highly prejudicial information and why evidentiary rulings must be carefully made.

Here, juror 5 was biased and prejudiced, consciously or unconsciously, to believe Dr. Honan over Dr. Altschuler. This is reflected in the answers given by juror 5 to questions asked of her. Juror 5 indicated she was aware of Dr. Honan's role at Banner Samaritan Hospital and that his role included supervisory responsibilities. Juror 5 also expressed her opinion—her prejudice and bias—that all the doctors at Banner Samaritan, including Dr. Honan, were "excellent surgeons." This belief carries weight when the juror has to weigh testimony and make credibility decisions. In particular, juror 5 was tasked with weighing the testimony of some doctor she had never heard of with the testimony of a doctor she believed, from personal information, to have been entrusted by a reputable teaching hospital with the care of patients and the instruction and supervision of surgical residents. Juror 5 was tasked to weigh the testimony of an unknown doctor against a doctor she already believed to be an "excellent surgeon." While the juror may have believed she could be impartial, the answers given by juror 5 reflected an unconscious bias. Thus, the trial court should have granted the motion to strike pursuant to the Sixth and Fourteenth Amendments of the United States Constitution and Article 2, §§ 23 and 24 of the Arizona Constitution. Moreover, the trial court violated A.R.S. § 21-211, which mandates the removal of biased or prejudiced jurors. Because a biased and prejudiced juror, who had an indirect interest in the testimony of one of the expert witnesses, was permitted to

deliberate and deliver a sentence in this case, Lynch was deprived of his right to an indifferent and impartial jury.

2. Juror 5 possessed specific knowledge derived from personal experience.

As indicated above, the Constitutional guarantee of an impartial jury requires "that a jury's verdict must be based upon the evidence developed at the trial ...." *Turner v. State of Louisiana*, 379 U.S. 466, 472, 85 S.Ct. 546, 549 (1965) (internal quotation marks omitted); *accord Eddington*, 228 Ariz. 361, ¶ 8, 266 P.3d 1057, ¶ 8.

The questioning revealed juror 5 possessed knowledge that was derived from a source other than the evidence. Juror 5 knew Banner Samaritan was a "teaching hospital," Dr. Honan acted as a supervisor to surgical residents, and surgical residents relied upon Dr. Honan's directions when treating patients. RT 7/26/2012, 144-47. Juror 5 further had knowledge of the reputation of doctors who worked at Banner Samaritan, including Dr. Honan. *Id.* at 146-47. Juror 5 believed the doctors who work at Banner Samaritan were "excellent surgeons." *Id.* at 146.

This information was not elicited during the examination of Dr. Honan. Dr. Honan never testified that Banner Samaritan was a "teaching hospital" or what that meant, that he acted as a supervisor/teacher to surgical residents, that surgical residents relied upon his directions when treating patients, or that the doctors who

worked at Banner Samaritan (including himself) were "excellent surgeons." This information was derived from the juror's independent knowledge.

After the trial court denied the motion to strike juror 5, the trial court took no steps to ensure juror 5 would set aside this personal knowledge. The trial court did not individually instruct juror 5 to set aside her knowledge and judge the case solely on the evidence presented at trial.

The instructions read to the jury, in fact, had the opposite impact: the instructions encouraged juror 5 to consider her personal knowledge when evaluating the credibility of Dr. Honan as opposed to Dr. Altschuler. The court instructed the jurors:

> A witness qualified as an expert by education or experience may state opinions on matters in that witness's field of expertise, and may also state reasons for those opinions. Expert opinion testimony should be judged just as any other testimony. You are not bound by it. You may accept it or reject it, in whole or in part, and you should give it as much credibility and weight as you think it deserves, considering the witness's qualifications and experience, the reasons given for the opinions, and all the other evidence in the case.

RT 8/9/2012, 10. This language instructed juror 5 to consider the testimony of the experts based upon the experience of the experts. However, juror 5 had personal knowledge as to the depth and quality of Dr. Honan's experience. Juror 5 had a

preconceived opinion regarding the quality of doctors who worked at Banner Samaritan. Juror 5 knew Dr. Honan worked in a teaching/supervising capacity. Juror 5 knew the people she had worked with relied upon Dr. Honan. This information is certainly relevant to Dr. Honan's qualifications and experience. Moreover, the expert witness instruction indicates expert witnesses are to be judged the same as any other witness. Thus, the standard credibility instruction is also relevant:

> You are the sole judges of the credibility of the witnesses and what weight is to be given the testimony of each witness. In considering the testimony of each witness, you may take into account the opportunity and ability of the witness to observe, the witness's memory and manner while testifying, any interest, bias or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on credibility and weight.

Id. at 8. Again, the personal knowledge possessed by Juror 5 would impact how Juror 5 evaluates the reasonableness of Dr. Honan's testimony. Moreover, the personal knowledge would certainly be another factor bearing upon the credibility and weight of Dr. Honan's testimony. These two instructions, taken individually and jointly, instructed Juror 5 to consider her personal knowledge of Dr. Honan when deciding which expert to credit.

The instructions, taken as a whole, do not correct this error. The only instruction which could possibly be said to limit Juror 5 in her ability to apply her personal knowledge was:

> The evidence you shall consider consists of the testimony of witnesses and exhibits the Court has admitted in evidence during this hearing.

Id. at 7 However, this instruction merely entrenches the problem. The instruction reiterates the importance of the testimony, thereby referencing jurors to the expert witness and credibility instructions. The expert witness and credibility instructions encouraged consideration of the outside information. Moreover, the structure of the instructions, taken as a whole, would have also communicated to Juror 5 she could consider her personal knowledge. Where there was an express prohibition on granting witnesses or evidence more weight, the instructions clearly articulated the prohibition. *E.g. Id.* at 5 (instructing jurors not to consider "conjecture, passion, prejudice, public opinion or public feeling," "race, color, religion, national ancestry, gender or sexual orientation" and instructing jurors not to consider the trial court's conduct as commenting on the evidence); 7 (instructing jurors to disregard "questions and exhibits that were withdrawn or to which objections were sustained," "testimony and exhibits that the court has not admitted or the court has stricken," and to appropriately restrict consideration of evidence admitted for a limited purpose); 7-8 (instructing

jurors not to reconsider Lynch's conviction or the aggravating circumstances when deciding penalty); 9 (instructing jury not to consider testimony or evidence where an objection was sustained); 9-10 (instructing jurors not to consider Lynch's decision not to testify); 10 (law enforcement officers are not entitled to greater weight because of position); 10-11 (lawyers comments are not evidence); 13 (limiting consideration of victim impact statements). The instructions completely spelled out the restrictions to be applied. Nothing in the instructions, and nothing prior to the instructions, informed juror 5 she was not to consider her personal knowledge when evaluating the credibility of the expert witnesses.

Because juror 5 possessed personal knowledge that went to the determination of credibility, and because the trial court took no steps to correct the problem, the trial court deprived Lynch of his right to an impartial and indifferent jury. This right was deprived, foremost, by the trial court's failure to dismiss Juror 5 for cause. However, after the trial court decided it would not dismiss Juror 5, the trial court further deprived Lynch of his right to an impartial jury when it failed to adequately instruct the juror not to consider her personal knowledge. Rather, the trial court read standard instructions which, in effect, instructed Juror 5 to consider her personal knowledge of Dr. Honan's background, experience and training.

3. The participation of Juror 5 undermines public confidence.

As indicated above, the guarantees of the Sixth Amendment and Article 2, § 24 contain a consideration of whether a trial court's decision betrays public confidence in the judicial system. The trial court failed to adequately consider this factor. The trial court was confronted with a juror who recognized the State's expert witness, had extra-judicial knowledge of the witness's experience and qualifications, and had a generalized impression of the witness's reputation. This information was derived from the fact that the witness and juror shared an employer just a couple years prior to the trial date. This established employment link, when taken in conjunction with the juror's knowledge of Dr. Honan's background and experience and preconceived belief of his reputation, constitutes an improper link that undermines confidence in the proceedings and the verdict. Because the trial court failed to adequately consider and account for this violation of public trust, the sentence in this case should be vacated and this Court should impose a life sentence.

4. An impartial jury was not secured in the present case.

Here, the jury which considered sentence was not an indifferent and impartial jury. Juror 5 remained on the jury panel when the trial court refused the motion to strike. Juror 5 was selected to deliberate with the jury. Juror 5 participated in the deliberation and returned a verdict on the sentence. Because the record "affirmatively

shows that such a fair and impartial jury was not secured," this Court should vacate the sentence. *See State v. Arnett*, 119 Ariz. 38, 50, 579 P.2d 542, 554 (1978).

ARGUMENT 6

MITIGATION IS SUFFICIENTLY SUBSTANTIAL TO CALL FOR LENIENCY

Standard of Review:

Since the offenses in this case occurred on March 25, 2001, (I. 1) this Court must independently review the aggravating and mitigating circumstances and the propriety of the death sentences. *State v. Andriano*, 215 Ariz. 497, 510, ¶ 63, 161 P.3d 540 (2007). The court reviews the entire record *de novo* to "determine [whether] an error was made regarding a finding of aggravation." *State v. Kiles (Kiles II)*, 222 Ariz. 25, 38, ¶ 63, 213 P.3d 174 (2009) (quoting *Anderson II*, 210 Ariz. at 343, 354, n.21, ¶ 119).

In its independent review, this Court does not merely consider the quantity of factors proven but looks at the quality and strength of those factors. *State v. Greene*, 192 Ariz. 431, 443, ¶ 60, 967 P.2d 106, 118 (1998). The Court will "'not defer to the findings or decision of the jury' with respect to aggravation or mitigation, when "determining the propriety of the death sentence."' *State v. Newell*, 212 Ariz. 389, 405, ¶ 82, 132 P.3d 833, 859 (2006) (quoting *State v. Roseberry*, 210 Ariz. 360, 374, ¶ 77, 111 P.3d 402, 416 (2005)). "When there is a doubt whether the death sentence should be imposed, [the Court] will resolve that doubt in favor of a life sentence."

State v. Carlson, 202 Ariz. 570, 588, ¶ 70, 48 P.3d 1180 (2002); *State v. Valencia*, 132 Ariz. 248, 250, 645 P.2d 239, 241 (1982).

Discussion:

> '(T)he gravity of the death penalty requires that we painstakingly examine the record to determine whether it has been erroneously imposed * * * (B)ecause A.R.S. § 13-454 sets out the factors which must be found and considered by the sentencing court, we necessarily undertake an independent review of the facts that establish the presence or absence of aggravating and mitigating circumstances. (citations omitted). We must determine for ourselves if the latter outweigh the former when we find both to be present.' *State v. Richmond*, 114 Ariz. 186, 196, 560 P.2d 41, 51 (1976), cert. denied 433 U.S. 915, 97 S.Ct. 2988, 53 L.Ed.2d 1101 (1977); see also *State v. Blazak*, 114 Ariz. 199, 560 P.2d 54 (1977).
>
> The question before us is not whether the trial court properly imposed the death penalty, but whether, based upon the record before us, we believe that the death penalty should be imposed. A finding merely that the imposition of the death penalty by the trial court was "factually supported" or "justified by the evidence" is not the separate and independent judgment by this court that the death penalty warrants. This is in keeping with the mandate of the United States Supreme Court that we must review carefully and with consistency death penalty cases and not engage in a "cursory" or "rubber stamp" type of review. Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).
>
> The death penalty statute must not be applied freakishly or unevenly. We review each and every death penalty imposed in the State of Arizona, and not only are we in a

> position to insure that, based upon all the records that come before us, the death penalty is evenly enforced on appeal, but also that it is not inflicted in an arbitrary and capricious manner.

State v. Watson, 129 Ariz. 60, 63, 628 P.2d 943, 946 (1981).

Watson is no less applicable to this post jury death sentence independent review which, after careful consideration, should lead to a sentence of life. This Court has indicated that its independent review includes the entire record, not just the record of matters before the sentencing trier of fact. *State v. White*, 168 Ariz. 500, 521, 815 P.2d 869 (1991) ("We must determine for ourselves, based upon an independent review of the entire record, whether 'we believe that the death penalty should be imposed.'" (quoting *Watson*, 129 Ariz. at 63)). This case has previously been before this Court on appeal where the case was remanded for a new penalty phase proceeding. *Lynch*, 225 Ariz. 27, 234 P.3d 595 (2010). In conducting its independent review, this Court should review the entire record of the case to find that the mitigation is sufficiently substantial to call for leniency.

On remand for a new penalty phase proceeding, this Court instructed: "Any new penalty phase jury should be instructed that the (F)(5) and (F)(6) aggravators have been previously found and that it is not to retry those issues." *Id.*

Lynch proved significant mitigation in addition to that presented at his original sentencing proceeding. Mitigation that is sufficiently substantial and should lead to leniency in this case.

During the reading of the preliminary instructions in this case, the penalty phase jury was instructed:

> The circumstances proposed as mitigation by Shawn Lynch for your consideration are:
>
> 1. The evidence is inconclusive as to whether it was Michael Sehwani or Shawn Lynch who used a knife to kill Mr. Panzarella.
>
> 2. The codefendant, Michael Sehwani, received a life sentence in this case.
>
> 3. Shawn Lynch suffers from chronic hepatitis C with cirrhosis of his liver and as a result he has a significantly diminished life expectancy.
>
> 4. Shawn Lynch's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired but not so impaired as to constitute a defense to the prosecution.
>
> 5. Shawn Lynch was raised in an unstable family filled with domestic abuse.
>
> 6. As a child Shawn Lynch suffered physical and emotional abuse from his father.

7 To punish Shawn Lynch for playing with matches Shawn's father put Shawn's hand on a hot stove causing Shawn to be injured.

8. Shawn Lynch's mother and father periodically neglected him throughout his childhood.

9. Shawn Lynch was raised in a family where both parents suffered from alcoholism.

10. Shawn Lynch's younger brother committed suicide by drug overdose.

11. Shawn Lynch suffered from drug abuse.

12. Shawn Lynch would not pose a danger to correction employee officers or other inmates if he receives a life sentence.

13. Shawn Lynch has been sentenced to a term of 21 years in the Arizona Department of Corrections for the convictions for kidnapping, armed robbery and burglary in the first degree and these sentences have been ordered to run consecutively to whatever sentence he receives for the conviction of murder in the first degree.

(RT 7/17/2012, 37-38). In its final instructions, the jury was advised as to the same proposed mitigating circumstances. (RT 8/9/2012, 14-15.)

The jury was also instructed that they were not limited by those proposed mitigating circumstances. (*Id.* 16-17).

Even though this Court must independently review the entire record to determine the propriety of the death sentence in this case, Lynch emphasizes for this

Court that a defendant's physical condition is a mitigating factor. *State v. Patton*, 120 Ariz. 386, 389, 586 P.2d 635, 638 (1978). Lynch has Hepatitis C and is suffering from its effects.

Dr. Gerald Altschuler, a hematologist, oncologist, and internist physician, testified concerning Lynch's hepatitis C and he testified as to the Arizona Department of Corrections choices concerning treatment of inmates with that condition. (RT 7/23/2012, 55-58). He said that, prior to 2009 the Department of Corrections had a program at St. Mary's Hospital in Tucson where inmates with hepatitis C were treated but that, at the end of 2009, the department shut the treatment program down because of budget issues. (*Id.* 55-58). Altschuler explained that hepatitis C was a virus that attacks the liver and leaves the liver in a "shambles." (*Id.* 61-62). He also explained how the liver "the main detoxification and metabolic organ in the body." (*Id.* 62). He explained that if a person takes a drug that "the drug is metabolized into an active form and then the liver gets rid of the metabolites" and that if the liver did not do that then the body would be poisoned. (*Id.* 63).

Altschuler said that in Lynch's case the method of his exposure to the virus was "always going to be an unknown." (*Id.* 67). He went on to discuss the complications that Lynch was experiencing. (*Id.* 83). Lynch had cellulitis in his legs that was from a bacterial infection. (*Id.* 84). Because of his condition, fluid leaked out of his blood

vessels and caused his skin to stretch. (*Id.* 85). The stretching broke the skin and the bacteria entered Lynch's system and caused infection. (*Id*). According to the doctor, the fluid leak was a vicious cycle – the more swollen Lynch's legs become, the more prone he was to infection and the more his skin would break down. (*Id.* 86). Altschuler said that there was "always a possibility" that Lynch could lose his legs. (*Id.* 87).

Altschuler also testified that Lynch had endured several hospitalizations for encephalopathy. (*Id.* 87). He said that was because Lynch's failing liver caused nitrogenous waste to build up in his blood. (*Id.* 87-88). One of those waste products was ammonia. (*Id.* 88). A normal amount of ammonia in the blood is zero to 25-30. (*Id.* 88). Even after he received treatment, the ammonia level in Lynch's blood was 66. (*Id*). Altschuler said that ammonia affects the brain and that, when ammonia in the body raises to a high level, "it has an effect on muscle and nerve function so that a very characteristic neurological problem for hepatic encephalopathy is a flapping tremor of the hands." (*Id*). According to him, hepatic encephalopathy "also has subtle impairments, thinking, judgment, hallucinations, that type of thing. It affects the overall brain function." (*Id*).

Altschuler added that another complication from hepatitis C that Lynch was suffering was pancytopenia. (*Id.* 91). He described that how because Lynch's liver

was not functioning that other organs also did not function as they should. (*Id*). In this case, Lynch's bone marrow did not function as it should – his disease caused his white blood cell count to be too low, such that it was inappropriate for the degree of infection in Lynch's legs. (*Id.* 91-92). Altschuler described Lynch's liver disease as "fairly severe" – saying that Lynch "had cirrhosis of the liver which is scarring and that was implied by the different chemical tests that were done and the examination and the overall picture of the swelling of the leg and measuring the protein in the body, the fact that he had encephalopathy where they measured the blood ammonia level that we discussed before and that was elevated but had come down with treatment." (*Id.* 93-94). The same hospital report that he was reviewing notes that Lynch had chronic venous insufficiency meaning that the veins in Lynch's leg were not working well. (*Id.* 94). The report said that Lynch suffered from "end-stage liver disease." (*Id.* 93).

Altschuler said that Lynch suffered from a type of hepatitis C that was least responsive to treatment. (*Id.* 97). He said that Lynch had never received treatment for his disease because the "Department of Corrections has a committee to decide on treatment. The criteria for when to treat and when not to treat is also very complicated." (*Id*). He said that the committee decided that Lynch was not a candidate for treatment because of the side effects of the drugs and because Lynch had

underlying heart disease. (*Id.* 98). Altschuler added that in his opinion that Lynch's severe depression and paranoia also caused treatment to be contraindicated. (*Id.* 99).

Altschuler said that, by measuring how quickly Lynch's blood would clot, how much protein was in his blood, how much scarring was on his liver, they could give an approximation of his remaining life span. (*Id.* 102-103). He said that with scarring in the liver, that blood tends to back up and when it goes through the esophageal veins in the neck that it causes those veins to swell and to burst. (*Id.* 104). So, another measure of the progression of the disease is the increased size of the veins in the esophagus and the amount of bilirubin in the blood. (*Id.* 104). Altschuler said that Lynch's score varied between eight and ten. (*Id.* 105). A score of 7 to 9 points gives a chance of living a year at 81 percent but only a 57 percent chance of living two years. (*Id.* 106). With a score of 10, the chance of living a year is 43 percent and the chance of living two years drops to 35 percent. (*Id.* 107).

Altschuler described Lynch as a "sick man" – saying that Lynch had hepatitis C, cellulitis, and diastolic heart disease. (*Id.* 120).

Lynch's medical evidence demonstrates the requisite sufficient likelihood of unnecessary pain and suffering beyond the constitutionally permissible amount inherent in all executions that, at the very least deserves substantial mitigation weight. It is not just Lynch's condition as a chronically "sick man" that warrants leniency but

also the situation that Lynch experiences as a chronically "sick man" sitting in a death row cell. "Nor can we withhold our conviction of the proposition that when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it ... as to the precise time when his execution shall take place." *In re Medley*, 134 U.S. 160, 172-173 (1890). Lynch's serious medical conditions multiply those "horrible feelings" and, as such, are substantial mitigation that entitles him to leniency.

Lynch's medical condition in addition to the other mitigating present in the entire record is sufficiently substantial to call for leniency. This Court should vacate the death sentence and impose a life sentence.

ARGUMENT 7

ARIZONA DEATH PENALTY IS UNCONSTITUTIONAL.

Mr. Lynch recognizes that this Court has previously found these claims to be constitutional as evidenced by his citation to the cases previously rejecting these claims. However, he requests this Court re-examine these issues in determining the constitutionality of the death penalty in Arizona.

1. The death penalty is cruel and unusual under any circumstances and violates the Eighth and Fourteenth Amendments to the United States Constitution and Article 2, § 15 of the Arizona Constitution. *State v. Harrod,* 200 Ariz. 309, 320, 26 P.3d 492, 503 (2001)(*vacated on other grounds by Harrod v. Arizona, 536 U.S. 953 (2002)*); *State v. Blazak,* 131 Ariz. 598, 601, 643 P.2d 694, 697 (1982).

2. The death penalty is imposed arbitrarily and irrationally in Arizona in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article 2, § 15 of the Arizona Constitution, as well as Mr. Lynch's right to due process under the Fourteenth Amendment to the United States Constitution and Article 2, § 4 of the Arizona Constitution. *State v. Beaty,* 158 Ariz. 232, 762 P.2d 519 (1988).

3. There is no meaningful distinction between capital and non-capital murder cases, making each crime the product of an unconstitutionally vague statute. *State v Salazar,* 173 Ariz. 399, 411, 844 P.2d 566, 578 (1992).

4. Arizona's death penalty is applied so as to discriminate against poor, young, and male defendants in violation of Ariz. Const. Art. 2, §§1, 4, 13. *Contra State v. Sansing*, 200 Ariz. 347, 361, 26 P.3d 1118, 1132 (2001) (*vacated on other grounds by Sansing v. Arizona, 536 U.S. 954 (2002)).*

5. The death penalty is the irreversible denial of human rights. The Eighth Amendment "draw'[s] its meaning from evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958); *see also, Roper v Simmons,* 543 U.S. 551 (2005). The international community of nations has evolved to a state of maturity that abolishes the death penalty. Today, the majority of nations have abolished the death penalty. Amnesty International, *Facts and Figures on the Death Penalty* (January 1, 2006). The Universal Declaration of Human Rights, GA Res. 217A (III), U.N. GAOR, 3d Sess. Art. 3, U.N. Doc. A/810 (1948) provides that "Everyone has the right to life, liberty, and security of person." The death penalty violates the Universal Declaration of Human Rights. Mr. Lynch's death sentence not only violates the Eighth and Fourteenth Amendments of the U.S. Constitution but

international law as the majority of civilized nations bar the death penalty. This Court previously held that the death penalty is not unconstitutional or violative of international law. *State v. Ross*, 180 Ariz. 598, 602, 886 P.2d 1354, 1358 (1994).

6. Application of the death penalty on the facts of this case would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article 2, §§ 1, 4, and 15 of the Arizona Constitution.

7 The prosecutor's discretion to seek the death penalty has no standards and therefore violates the Eighth and Fourteenth Amendments to the United States Constitution and Article 2, §§ 1, 4, and 15 of the Arizona Constitution. *State v. Sansing*, 200 Ariz. 347, 361, 26 P.3d 1118, 1132 (2001) (*vacated on other grounds by Sansing v. Arizona, 536 U.S. 954 (2002)).*

8. Application of the death penalty statutes promulgated after *Ring v. Arizona*, 536 U.S. 584 (2002) *(Ring II)*, violates the prohibition against *ex post facto* laws. The changes altered the rules of evidence to permit different testimony. U.S. Const. Art. 1, § 10, Clause 1, Ariz. Const. Art. 2, § 25. *State v. Ring*, 204 Ariz. 534, 65 P.3d 915 (2003) *(Ring III)*.

9. Arizona's death penalty scheme is unconstitutional because it does not require the sentencer to find beyond a reasonable doubt that the aggravating circumstances outweigh the accumulated mitigating circumstances. Instead, Arizona's death penalty statute mandates defendant's to prove their lives should be spared in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article 2, §§ 4 and 15 of the Arizona Constitution. *State v. Roque*, 213 Ariz. 193, 225-26 (2006); *State v. Poyson*, 198 Ariz. 70, 83, 7 P.3d 79, 92 (2000).

10. The absence of proportionality review of death sentences by Arizona courts denies capital defendants due process of law and equal protection and amounts to cruel and unusual punishment in violation of the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and Article 2, § 15 of the Arizona Constitution. *State v. Salazar*, 173 Ariz. 399, 416, 344 P.2d 566, 583 (1992). Proportionality review serves to identify which cases are "above the norm" of first-degree murder thus narrowing the class of defendants who are eligible for the death penalty.

11. Arizona's capital sentencing scheme is unconstitutional because it does not require that the State prove that the death penalty is appropriate. Failure to require this proof violates the Fifth, Eighth, and Fourteenth Amendments to the

United States Constitution and Article 2, § 15 of the Arizona Constitution. *State v. Ring,* 200 Ariz. 267, 284, 25 P.3d 1139, 1156 (2001)(*Ring I*), *rev 'd on other grounds by Ring II; State v. Gulbrandson,* 184 Ariz. 46, 72, 906 P.2d 579, 605 (1995).

12. A.R.S. § 13-703 (renumbered as A.R.S. § 13-751, effective January 1, 2009) provides no objective standards to guide the sentencer in weighing the aggravating and mitigating circumstances and therefore violates the Eighth and Fourteenth Amendments of the United States Constitution and Article 2, § 15 of the Arizona Constitution. *State v. Pandeli,* 200 Ariz. 365, 382, 26 P.3d 1136, 1153 (2001)(*vacated on other grounds by Pandeli v. Arizona,* 536 U.S. 953 (2002)).

13. Arizona's death penalty law unconstitutionally fails to require the cumulative consideration of multiple mitigating factors or require that the jury make specific findings as to each mitigating factor. *State v. Gulbrandson,* 184 Ariz. 46, 69, 906 P.2d 579, 602 (1995).

14. Retrying the penalty phase violated Appellant's rights under the Double Jeopardy Clause and the Eighth Amendment. In *State v. Medina,* 232 Ariz. 391, 306 P.3d 48 (2013), the Court noted that "the touchstone for double-jeopardy protection in capital-sentencing proceedings is whether there has been

an acquittal." *Id.* at 400 ¶ 20, 306 P.3d at 57 (quoting *Sattazahn v. Pennsylvania,* 537 U.S. 101, 109, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003)) (internal quotation marks omitted). In *Medina,* this Court also "rejected the argument that retrial of the penalty phase was disproportionate punishment under the Eighth Amendment. *Id.* at 401–02 ¶¶ 24–28, 306 P.3d at 58–59." *State v. Reeves,* 233 Ariz. 182, 185, 310 P.3d 970, 973 (2013).

15. Arizona's death penalty scheme violates Appellant's right to equal protection under the Fourteenth Amendment since it fails to require the jury to make specific findings of fact and conclusions of law reviewable on appeal. *State v. Dann,* 220 Ariz. 351, 373, ¶¶ 127-28, 207 P.3d 604, 626 (2009)(*Dann III*).

16. Arizona's death penalty scheme violates Appellant's rights under the Eighth and Fourteenth Amendments by not requiring that once a defendant proves mitigating circumstances exist that the State prove beyond a reasonable doubt that the mitigation is not sufficiently substantial to call for leniency and that death is the appropriate sentence. *Dann,* 220 Ariz. 351, 369, ¶¶94-95, 207 P.3d 604, 622 (2009).

17. A.R.S. § 13-703 (renumbered as § 13-751 and amended by Laws 2008, ch. 301, § 26, 38, eff. Jan. 1, 2009) did not sufficiently channel the sentencer's discretion. Aggravating circumstances should narrow the class of persons

eligible for the death penalty and reasonably justify the imposition of a harsher penalty. The broad scope of Arizona's aggravating factors encompasses nearly anyone involved in a murder, in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article 2, § 15 of the Arizona Constitution. *Pandeli,* 200 Ariz. at 382,26 P.3d at 1153; *State v. Bocharski,* 218 Ariz. 476, 488, 189 P.3d 403, 415 (2008)(*Bocharski II*).

18. The trial court improperly omitted from the penalty phase instructions words to the effect that jurors may consider mercy or sympathy in deciding the value to assign the mitigation evidence. Instead it told them to assign whatever value the jury deemed appropriate and not to be influenced by "mere sympathy not related to the evidence presented at the penalty phase." (I. 131). This error limited the mitigation the jury could consider violating U.S. Const. amends. V, VI, VIII, XIV; Ariz. Const. art. 2, §§ 1, 4, 15, 23, 24; *State v. Carreon,* 210 Ariz. 54, 70-72, ¶¶ 81-87, 107 P.3d 900, 916-918 (2005).

19. Victim impact evidence admitted at the penalty phase of the trial violates constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article 2, §§1, 4, 13, 15, 23, 24 of the Arizona Constitution. *Contra Lynn v. Reinstein,* 205 Ariz. 186,191, 68 P.3d

412 (2003); *State ex rel. Thomas v. Foreman*, 211 Ariz. 153, 118 P.3d 1117 (App. 2005).

20. The refusal to permit *voir dire* of prospective jurors regarding their views on specific aggravating and mitigating circumstances violates Appellant's rights under the Sixth and Fourteenth Amendments. *State v. Johnson*, 212 Ariz. 425, 434, ¶¶ 29-35, 133 P.3d 735, 744 (2006).

21. The jury instruction that required the jury to unanimously determine that the mitigating circumstances were "sufficiently substantial to call for leniency" violated U.S. Const. amends. V, VI, VIII, XIV; Ariz. Const, art. 2, §§ 1, 4, 15, 23, 24; *State v. Ellison*, 213 Ariz. 116, 139, ¶¶ 101-102, 140 P.3d 899, 922 (2006).

22. The failure to instruct the jury that only murders that are "above the norm" may qualify for the death penalty violates the Sixth, Eighth, and Fourteenth Amendments. *Bocharski* (*Bocharski II*), 218 Ariz. 476, 487, ¶¶ 47-50, 189 P.3d 403, 414 (2008).

23. The fact-finder in capital cases must be able to consider all relevant mitigating evidence in deciding whether to give the death penalty. *See Woodson v North Carolina*, 428 U.S. 280, 304 (1976). The failure to allow this jury to consider and give effect to *all* mitigating evidence in this case by limiting its

consideration to that proven by a preponderance of the evidence is unconstitutional. U.S. Const. Amends. VIII, XIV; *Contra State v. McGill*, 213 Ariz. 147, 161, ¶54, 140 P.3d 930, 944 (2006).

24. Arizona's lethal injection statute and the protocol implementing that statute do not have any of the safeguards in place that were considered by the United States Supreme Court in *Baze v. Rees,* 553 U.S. 35 (2008), to, at the least, make an attempt to insure an execution is humane. As it stands in Arizona, execution by lethal injection is cruel and unusual punishment in violation of the VIII and XIV Amendments to the United States Constitution and Article 2, § 15 of the Arizona Constitution. *State v. Van Adams,* 194 Ariz. 408, 422, ¶55, 984 P.2d 16, 30 (1999).

25. Arizona's death penalty unconstitutionally requires imposition of the death penalty whenever at least one aggravating circumstance and no mitigating circumstances exist, in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article 2, § 15 of the Arizona Constitution. *State v. Miles,* 186 Ariz. 10, 19, 918 P.2d 1028, 1037 (1996).

26. Arizona's sentencing statutes allow for unrestrained mitigation rebuttal that violates a defendant's constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article 2, §§1, 4,

13, 15, 23, 24 of the Arizona Constitution. In *State v. Hampton*, 213 Ariz. 167, 179, 140 P.3d 950, 962 (2006), this Court noted the admission of rebuttal testimony in the penalty phase "is ultimately constrained by the Due Process Clause of the Fourteenth Amendment." "Evidence presented for rebuttal must be relevant to the mitigation proffered." *State v. Boggs*, 218 Ariz. 325, 339, 185 P.3d 111, 125 (2008).

CONCLUSION

This Court should vacate the death sentence imposed in this matter and impose a life sentence.

Respectfully submitted,

MARICOPA COUNTY PUBLIC DEFENDER

By /s/
Tennie B. Martin
Deputy Public Defender
Attorney for Appellant

APPENDIX – C –

ARIZONA SUPREME COURT

STATE OF ARIZONA, Appellee, v. SHAWN PATRICK LYNCH, Appellant.	CR–12–0359–AP Maricopa County Superior Court No. CR–2001–092032(A)

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QUESTIONS PRESENTED FOR REVIEW

1. Has Lynch demonstrated fundamental error with respect to allegations of prosecutorial misconduct to which he did not object at trial? Did the trial court err in addressing misconduct-related objections Lynch made at trial where he never argued that prosecutorial misconduct warranted a mistrial or new trial?

2. In a case where this Court remanded for a retrial on penalty-phase issues only, did the trial court err by denying Lynch's motions to retry the aggravating circumstances and to admit the guilt-phase verdict form as mitigation?

3. Did the trial court abuse its discretion by declining to give an instruction pursuant to *Simmons v. South Carolina* where Arizona law does not make Lynch ineligible for parole?

4. Did the trial court abuse its discretion when it denied Lynch's challenge to the State's use of peremptory strikes under *Batson v. Kentucky*?

5. Did the trial court abuse its discretion when it declined to strike for cause a juror who previously worked at the same hospital as, but who had no personal contact with, an expert witness?

6. Was Lynch's mitigation sufficiently substantial to call for leniency?

7. Is Arizona's death penalty unconstitutional?

8. Is Arizona's death penalty as currently administered cruel and unusual?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

ARGUMENTS

I

THE PROSECUTOR DID NOT COMMIT MISCONDUCT. 3

II

THE TRIAL COURT DID NOT ERR BY FOLLOWING THIS COURT'S ORDER AND DENYING LYNCH'S MOTION TO RETRY THE AGGRAVATING FACTORS. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY PRECLUDING THE GUILT-PHASE VERDICT FORM AS IRRELEVANT TO MITIGATION 67

III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED LYNCH'S "WAIVER" OF A RELEASE-ELIGIBLE SENTENCE AND DECLINED TO INSTRUCT THE JURY PURSUANT TO SIMMONS V SOUTH CAROLINA. 79

IV

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT REJECTED LYNCH'S BATSON CHALLENGE TO THE STATE'S USE OF PEREMPTORY STRIKES 84

V

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DECLINED TO STRIKE FOR CAUSE A JUROR WHO PREVIOUSLY WORKED WITH, BUT HAD NO PERSONAL CONTACT WITH, ONE OF THE STATE'S EXPERT WITNESSES. 91

VI

THE MITIGATION WAS NOT SUFFICIENTLY SUBSTANTIAL TO CALL FOR LENIENCY. 100

VII

THIS COURT HAS PREVIOUSLY REJECTED Lynch's SUMMARY CONSTITUTIONAL CHALLENGES TO ARIZONA'S DEATH PENALTY AND HE FAILS TO SUPPORT THE CHALLENGES WITH CONTRARY ARGUMENT OR AUTHORITY 113

VIII

LYNCH'S CHALLENGE TO ARIZONA'S IMPLEMENTATION OF THE DEATH PENALTY AS CRUEL AND UNUSUAL IS PREMATURE. 114

CONCLUSION 115

TABLE OF AUTHORITIES

Cases	Page
Batson v. Kentucky, 476 U.S. 79 (1986)	85–88, 90, 91
Blystone v. Pennsylvania, 494 U.S. 299 (1990)	52
Donnelly v. DeChristoforo, 416 U.S. 637 (1974)	4
Eddings v. Oklahoma, 455 U.S. 104 (1982)	76
Fisher v. State, 736 A.2d 1125 (Md. 1999)	14
Freeman v. United States, 495 A.2d 1183 (D.C.App. 1985)	14
Griffin v. California, 380 U.S. 609 (1965)	56
Kansas v. Marsh, 548 U.S. 163 (2006)	73
Lockett v. Ohio, 438 U.S. 586 (1978)	76, 77
Martin v. State, 22 Ariz. 327, 197 P. 578 (1921)	62, 114
Moss v. Commonwealth, 949 S.W.2d 579 (Ky. 1997)	14
Nordstrom v. Cruikshank, 213 Ariz. 434, 142 P.3d 1247 (App. 2006)	72
People v. Adams, 148 A.D.2d 964 (N.Y. 1989)	14
People v. Riley, 379 N.E.2d 746 (Ill. App. 1978)	14
Pool v. Superior Court, 139 Ariz. 98, 677 P.2d 261 (1984)	4, 8
Purkett v. Elem, 514 U.S. 765 (1995)	87–89
Ramdass v. Angelone, 530 U.S. 156 (2000)	81
Ring v. Arizona, 536 U.S. 584 (2002)	72
Simmons v. South Carolina, 512 U.S. 154 (1994)	80–83
State v. Aguilar, 217 Ariz. 235, 172 P.3d 423 (App. 2007)	4, 63
State v. Anderson, 210 Ariz. 327, 111 P.3d 369 (2005)	*passim*
State v. Andriano, 215 Ariz. 497, 161 P.3d 540 (2007)	64
State v. Armstrong, 218 Ariz. 451, 189 P.3d 378 (2008)	72
State v. Atwood, 171 Ariz. 576, 832 P.2d 593 (1992)	4, 8
State v. Bailey, 160 Ariz. 277, 772 P.2d 1130 (1989)	88
State v. Benson, 232 Ariz. 452, 307 P.3d 19 (2013)	77, 80–82, 84, 113

State v. Bible, 175 Ariz. 549, 858 P.2d 1152 (1993) ..... *passim*
State v. Bocharski, 218 Ariz. 476, 189 P.3d 403 (2008) 5
State v. Bolton, 182 Ariz. 290, 896 P.2d 830 (1995) 8
State v. Bonfiglio, 231 Ariz. 371, 295 P.3d 948 (2013) 40
State v. Boyston, 231 Ariz. 539, 298 P.3d 887 (2013) 82
State v. Canez, 202 Ariz. 133, 42 P.3d 564 (2002) 87, 88, 91, 105
State v. Cannon, 148 Ariz. 72, 713 P.2d 273 (1985) 29
State v. Carver, 160 Ariz. 167, 771 P.2d 1382 (1989) 32, 48, 66
State v. Casteneda-Perez, 810 P.2d 74 (Wash. App. 1991) 14
State v. Chappell, 225 Ariz. 229, 236 P.3d 1176 (2010) 77, 79, 82
State v. Comer, 165 Ariz. 413, 799 P.2d 333 (1990) 28, 94, 98
State v. Cornell, 179 Ariz. 314, 878 P.2d 1352 (1994) 12, 18, 34
State v. Cruz, 218 Ariz. 149, 181 P.3d 196 (2008) 83
State v. Dann, 220 Ariz. 351, 207 P.3d 604 (2009) 80, 81
State v. Decello, 113 Ariz. 255, 550 P.2d 633 (1976) 58
State v. Dixon, 226 Ariz. 545, 250 P.3d 1174 (2011) 64
State v. Dumaine, 162 Ariz. 392, 783 P.2d 1184 (1989) 34
State v. Eddington, 228 Ariz. 361, 266 P.3d 1057 (2011) 96, 97, 99
State v. Ellison, 213 Ariz. 116, 140 P.3d 899 (2006) 7, 105, 110
State v. Flanagan, 801 P.2d 675 (N.M. App. 1990) 14
State v. Forde, 233 Ariz. 543, 315 P.3d 1200 (2014) 31
State v. Gallardo, 225 Ariz. 560, 242 P.3d 159 (2010) 20, 64, 65
State v. Garcia, 224 Ariz. 1, 226 P.3d 370 (2010) ..... *passim*
State v. Hallman, 137 Ariz. 31, 668 P.2d 874 (1983) 34
State v. Hampton, 213 Ariz. 167, 140 P.3d 950 (2006) 111
State v. Hardy, 230 Ariz. 281, 283 P.3d 12 (2012) 81, 82
State v. Hargrave, 225 Ariz. 1, 234 P.3d 569 (2010) 32, 48, 58, 66, 82
State v. Hausner, 230 Ariz. 60, 280 P.3d 604 (2012) 82
State v. Henderson, 210 Ariz. 561, 115 P.3d 601 (2005) 5, 6, 17, 63, 96

State v. Herrera, 203 Ariz. 131, 51 P.3d 353 (App. 2002) 23
State v. Hoskins, 199 Ariz. 127, 14 P.3d 997 (2000) 94–97, 99, 104
State v. Hughes, 193 Ariz. 72, 969 P.2d 1184 (1998) 4, 34, 63, 65
State v. Hummert, 188 Ariz. 119, 933 P.2d 1187 (1997) 19
State v. Kayer, 194 Ariz. 423, 984 P.2d 31 (1999) 106
State v. Kiles, 222 Ariz. 25, 213 P.3d 174 (2009) 114
State v. Lehr, 227 Ariz. 140, 254 P.3d 379 (2011) 111
State v. Lopez, 217 Ariz. 433, 175 P.3d 682 (App. 2008) 28
State v. Lucas, 199 Ariz. 366, 18 P.3d 160 (App. 2001) 87
State v. Lynch, 225 Ariz. 27, 234 P.3d 595 (2010) ..... *passim*
State v. Manuel, 229 Ariz. 1, 270 P.3d 828 (2011) 9, 17, 22, 23, 44
State v. Martinez, 218 Ariz. 421, 189 P.3d 348 (2008) 4, 20, 30
State v. Mata, 125 Ariz. 233, 609 P.2d 48 (1980) 57, 60
State v. McKinney, 185 Ariz. 567, 917 P.2d 1214 (1996) 112
State v. Medina, 193 Ariz. 504, 975 P.2d 94 (1999) 95
State v. Medina, 232 Ariz. 391, 306 P.3d 48 (2013) 105, 108
State v. Morales, 198 Ariz. 372, 10 P.3d 630 (App. 2000) 9, 12, 13, 15, 31
State v. Morris, 215 Ariz. 324, 160 P.3d 203 (2007) 25, 60, 63–66
State v. Murdaugh, 209 Ariz. 19, 97 P.3d 844 (2004) 108
State v. Newell, 212 Ariz. 389, 132 P.3d 833 (2006) ..... *passim*
State v. Pandeli, 215 Ariz. 514, 161 P.3d 557 (2007) 72, 109
State v. Patton, 120 Ariz. 386, 586 P.2d 635 (1978) 106
State v. Payne, 233 Ariz. 484, 314 P.3d 1239 (2013) 12, 18
State v. Pilot, 595 N.W.2d 511 (Minn. 1999) 14
State v. Prince (*Prince I*), 204 Ariz. 156, 61 P.3d 450 (2003) 29
State v. Prince (*Prince II*), 226 Ariz. 516, 250 P.3d 1145 (2011) ..... *passim*
State v. Ramos, 235 P.3d 230, 330 P.3d 987 (App. 2014) 34, 35, 37, 42, 59
State v. Reeves, 233 Ariz. 182, 310 P.3d 970 (2013) 74
State v. Rodriguez, 192 Ariz. 58, 691 P.2d 1006 (1998) 35

State v. Roque, 213 Ariz. 193, 141 P.3d 368 (2006) 18, 20–23, 25, 90
State v. Rosas-Hernandez, 202 Ariz. 212, 42 P.3d 1177 (App. 2002) 35
State v. Roscoe, 184 Ariz. 484, 910 P.2d 635 (1996) 15
State v. Rutledge, 205 Ariz. 7, 66 P.3d 250 (2003) 56, 57
State v. Sansing, 206 Ariz. 232, 77 P.3d 30 (2003) 46, 109
State v. Schackart, 190 Ariz. 238, 947 P.2d 315 (1997) 62, 114
State v. Serna, 163 Ariz. 260, 787 P.2d 1056 (1990) 44
State v. Smith, 101 Ariz. 407, 420 P.2d 278 (1966) 57
State v. Smith, 182 Ariz. 113, 893 P.2d 764 (App. 1995) 35
State v. Snelling, 225 Ariz. 182, 236 P.3d 409 (2010) 71
State v. Sowards, 147 Ariz. 185, 709 P.2d 542 (App. 1984) 60
State v. Spencer, 176 Ariz. 36, 859 P.2d 146 (1993) 106
State v. Trostle, 191 Ariz. 4, 951 P.2d 869 (1997) 58–60, 87
State v. Velazquez, 216 Ariz. 300, 166 P.3d 91 (2007) 26, 33, 47
State v. Wallace, 229 Ariz. 155, 272 P.3d 1046 (2012) 100
State v. West, 176 Ariz. 432, 862 P.2d 192 (1993) 35, 36
State v. Zinsmeyer, 222 Ariz. 612, 218 P.3d 1069 (App. 2009) 40, 41, 42
Tennard v. Dretke, 542 U.S. 274 (2004) 106
Tovrea v. Superior Court, 101 Ariz. 295, 419 P.2d 79 (1966) 69
United States v. Necoechea, 986 F.2d 1273 (9th Cir. 1993) 42
United States v. Richter, 826 F.2d 206 (2d Cir. 1987) 14
Whatley v. State, 509 S.E.2d 45 (Ga. 1998) 14

Constitutional Provisions

Ariz. Const. art. 2, § 10 56
Ariz. Const. art. 6, § 5(3) 3

U.S. Const. amend. V 56
U.S. Const. amend. VI 72
U.S. Const. amend. VIII 77, 78
U.S. Const. amend. XIV 77

Statutes

A.R.S. § 13–117(B) 56
A.R.S. § 13–703(A) (2001) 81
A.R.S. § 13–751(A) 78
A.R.S. § 13–751(C) 104
A.R.S. § 13–751(F)(5) 2, 54, 68, 100
A.R.S. § 13–751(F)(6) ..... *passim*
A.R.S. § 13–751(G)(1) 45–47, 108, 109
A.R.S. § 13–752(C) 78
A.R.S. § 13–752(D) 71, 78
A.R.S. § 13–752(G) 49, 73, 74, 103
A.R.S. § 13–752(K) 49, 68–71, 73, 74
A.R.S. § 13–752(N) 68–72, 74
A.R.S. § 13–755(A) 100
A.R.S. § 13–4031 3
A.R.S. § 13–4033(A) 3
A.R.S. § 13–4036 72
A.R.S. § 21–211 ..... 91, 96, 97, 99
A.R.S. § 21–211(2) 96
A.R.S. § 21–211(4) 96

Rules

Ariz. R. Crim. P. 1.2 71
Ariz. R. Crim. P. 18.4(b) 94
Ariz. R. Crim. P. 31.18 69

Other Authorities

Ethical Rule 3.4(e) 19

STATEMENT OF THE CASE

On December 1, 2005, a jury found Lynch guilty of the first-degree murder of James Panzarella, as well as armed robbery, burglary, and kidnapping.[1] (ROA, Item 320.) The evidence presented at trial showed that on the early morning of March 25, 2001, Panzarella, Lynch, and Michael Sehwani, left a Scottsdale bar together and went to the guesthouse where Panzarella lived behind his parents' home. *State v. Lynch*, 225 Ariz. 27, 32, ¶ 2, 234 P.3d 595, 600 (2010). Over the next day and a half, Lynch and Sehwani used Panzarella's credit cards, debit card, and checks to obtain cash and make numerous purchases, including the services of an escort, cigarettes, gas, food, and motel rooms. *Id.* at 32–33, ¶¶ 3–9, 234 P.3d at 600–01. On the afternoon of March 25, Panzarella was found bound to a chair in the guesthouse kitchen, his throat slit and blood pooled on the floor. *Id.* at 32–33, ¶ 7, 234 P.3d at 600–01.

Police arrested Lynch and Sehwani the next day as they got into a truck in a motel parking lot. *Id.* at 33, ¶ 10, 234 P.3d at 601. Sehwani had

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[1] All 12 jurors found Lynch guilty of felony murder and 5 jurors also found him guilty of premeditated murder. (ROA, Item 299.)

Panzarella's credit cards and checks in his wallet.[2] *Id.* The keys to Panzarella's car and a sweater with Panzarella's blood on it were in the truck, and a pistol belonging to Panzarella was in the motel room Lynch and Sehwani had rented. *Id.* Lynch's shoes had Panzarella's blood on them. *Id.*

In the aggravation phase, the jury found that the murder was both especially heinous and cruel, but could not decide whether it was also especially depraved, A.R.S. § 13–751(F)(6), and could not decide whether the murder was committed in expectation of pecuniary gain, A.R.S. § 13–751(F)(5). (ROA, Item 323.) In the penalty phase, the jury could not reach a unanimous verdict. (*Id.*, Item 365.) A new jury was then empanelled, which found that the murder was committed in expectation of pecuniary gain and that the murder was especially depraved. (*Id.*, Item 456.) In the penalty phase, the jury sentenced Lynch to death for the murder. (*Id.*, Item 487.) The trial court sentenced Lynch to concurrent terms of 21 years' imprisonment for each of the three other counts, to be served consecutively to the sentence for the murder. (*Id.*, Item 483.)

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[2] After Lynch's trial, Sehwani pleaded guilty to first degree murder and theft, and received a sentence of natural life for the murder conviction. *Lynch*, 225 Ariz. at 33 n.4, ¶ 13, 234 P.3d at 601 n.4.

On appeal, this Court affirmed Lynch's convictions and non-capital sentences, but remanded for a new penalty phase on the murder due to an erroneous (F)(6) jury instruction. *Lynch*, 225 Ariz. at 43, ¶ 89, 234 P.3d at 611. After the penalty phase retrial, the jury again sentenced Lynch to death. (ROA, Item 793.)

On August 27, 2012, Lynch filed a timely notice of appeal from the judgment and sentence. This Court has jurisdiction under Arizona Constitution Article VI, Section 5(3), and Arizona Revised Statutes §§ 13–4031, and -4033(A).

ARGUMENTS

I

THE PROSECUTOR DID NOT COMMIT MISCONDUCT.

Lynch raises 12 claims of alleged prosecutorial misconduct, some of which were raised below, and some of which were not. No misconduct occurred, however, much less any misconduct rising to the level of reversible error.

A. LEGAL STANDARDS.

Prosecutorial misconduct "is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but taken as a whole, amounts to *intentional conduct* which the prosecutor *knows* to be improper and

prejudicial, which he pursues for any *improper purpose* with indifference to a significant resulting danger of mistrial." *State v. Aguilar*, 217 Ariz. 235, 239–40, ¶ 11, 172 P.3d 423, 426–27 (App. 2007) (quoting *Pool v. Superior Court*, 139 Ariz. 98, 108–09, 677 P.2d 261, 271–72 (1984)) (emphasis added.). A conviction will be reversed for prosecutorial misconduct only when "(1) misconduct is indeed present; and (2) a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying the defendant a fair trial." *State v. Martinez*, 218 Ariz. 421, 426, ¶ 15, 189 P.3d 348, 353 (2008). Prosecutorial misconduct affects the defendant's right to a fair trial when it has "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *State v. Hughes*, 193 Ariz. 72, 79, 969 P.2d 1184, 1191 (1998) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). To meet this standard, the misconduct must be "so pronounced and persistent that it permeates the entire atmosphere of the trial." *Id.* (quoting *State v. Atwood*, 171 Ariz. 576, 611, 832 P.2d 593, 628 (1992)).

"Because the trial court is in the best position to determine the effect of a prosecutor's comment on a jury, [this Court] will not disturb a trial court's denial of a mistrial for prosecutorial misconduct in the absence of a clear abuse of discretion." *State v. Newell*, 212 Ariz. 389, 402, ¶ 61, 132 P.3d 833, 846 (2006). When a defendant fails to object to an alleged act of prosecutorial

misconduct, however, this Court reviews only for fundamental error. *State v. Bocharski*, 218 Ariz. 476, 491, ¶ 74, 189 P.3d 403, 418 (2008). Under this standard, the defendant bears the burden of establishing both that fundamental error occurred and that the error caused prejudice. *State v. Henderson*, 210 Ariz. 561, 568, ¶ 23, 115 P.3d 601, 608 (2005).

B. LYNCH HAS ESTABLISHED NO INCIDENTS OF REVERSIBLE MISCONDUCT.

1. Allegation of argument in opening statement.

Citing to *State v. Bible*, 175 Ariz. 549, 602, 858 P.2d 1152, 1205 (1993), Lynch argues that the prosecutor improperly presented argument in his opening statement. (O.B. at 18–19.) Although Lynch notes that trial counsel twice objected on this basis, and that the court sustained the objections, he never asked for a mistrial and appears to claim that additional, unobjected-to instances of purported argument constituted error. (*Id.*) Consequently, insofar as he argues that the trial court should have granted a mistrial or challenges the unobjected-to remarks, review of this allegation of misconduct is limited to fundamental error. *See Bocharski*, 218 Ariz. at 491, ¶ 74, 189 P.3d at 418.

In *Bible*, this Court concluded that, in opening statement, the prosecutor improperly argued inferences and conclusions that may be drawn from evidence that was not yet admitted, but that there was no reason to reverse because the comment "was a reasonable inference from evidence later

introduced and would have been proper during closing argument"; therefore, the defendant was not deprived of a fair trial. 175 Ariz. at 602, 858 P.2d at 1205.

Here, Lynch points to three statements during the prosecutor's opening statement that Lynch characterizes as argument that certain mitigating factors and expected evidence should be granted little weight. These comments include:

- No medical records backed up allegations that Lynch's father burned his hand over a fire (R.T. 7/17/12, at 97–98);
- Little mitigating weight should be afforded to Lynch's childhood (*id.* at 98–99);
- Little weight should be given to testimony regarding Lynch's medical condition (*id.* at 103–04); and
- The defense was attempting to "pull at your heartstrings" (*id.* at 106).

Lynch does not argue that these comments were not reasonable inferences from the evidence later admitted or that they would have been improper if made during closing argument. Just as in *Bible*, even if the comments were more suited to a closing argument than an opening statement, Lynch cannot meet his burden of establishing prejudice, that is, that the remarks deprived him of a fair trial. *See Henderson*, 210 Ariz. at 568, ¶ 23, 115 P.3d at 608; *Bible*, 175 Ariz. at 602, 858 P.2d at 1205. This allegation of misconduct therefore fails.

2. ***Allegation of argumentative questions.***

Lynch next argues that the prosecutor improperly phrased questions in an argumentative manner. (O.B. at 20–21.) Specifically, he points to several questions to which the trial court sustained defense counsel's objections, questions to which the court overruled defense counsel's objections, and an occasion on which the judge told the prosecutor, "change your tone."[3] (R.T. 7/23/12, at 39.)

Although Lynch notes several instances when the trial court overruled defense counsel's objection that a question was argumentative, he never moved for a mistrial or new trial based on alleged misconduct, much less specifically because of argumentative questions. Consequently, insofar as he now argues the allegedly argumentative questions constituted reversible error, review is limited to fundamental error. *See State v. Ellison*, 213 Ariz. 116, 133, ¶ 61, 140 P.3d 899, 916 (2006) (defendant waives objection to testimony "if he fails

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[3] Lynch appears to suggest that on July 23, 2012, the trial court took a recess because the prosecutor "had again become argumentative." (O.B. at 21.) The record shows, however, that after defense counsel objected that a question the prosecutor asked was argumentative, the trial court took afternoon recess without ruling on the objection. (R.T. 7/23/12, at 129.) The court said nothing to indicate that the timing of the recess was related to the prosecutor's conduct. (*Id.* at 129–31.)

either to ask that it be stricken, with limiting instructions given, or to request a mistrial").

Lynch cannot meet his burden under this standard because has not even attempted to show, much less actually "shown how the alleged misconduct affected the outcome of his trial." *State v. Bolton*, 182 Ariz. 290, 308, 896 P.2d 830, 848 (1995). In fact, he has failed to argue that the questions affected the fairness of his trial; instead he simply points out allegedly argumentative questions without providing any argument. (O.B. at 20–21.) Even if the questions were argumentative, "the misconduct was not so egregious that it permeated the entire trial and probably affected the outcome." *Id.* (quoting *Atwood*, 171 Ariz. at 611, 832 P.2d at 628). And unlike in cases where the court has found actionable misconduct, the prosecutor "did not call defendant pejorative names, refer to matters not in evidence, suggest unfavorable matter for which no proof exists, or abuse defendant in any other way." *Id.* (citing *Pool*, 139 Ariz. at 98, 677 P.2d at 261).

Additionally, the trial court instructed the jurors that it should consider only evidence presented by testimony or exhibits, that the lawyers' comments were not evidence, and that it should ignore statements to which objections were sustained. (R.T. 7/17/12, at 27, 28–29, 30; R.T. 8/9/12, at 7, 8, 9.) These cautionary instructions, in light of the presumption that jurors follow them,

cured any potential prejudice, especially where Lynch has made no attempt to meet his burden of proving prejudice under fundamental error review. *See State v. Manuel*, 229 Ariz. 1, 6, ¶ 25, 270 P.3d 828, 833 (2011) (cautionary instructions cured any potential prejudice from prosecutor's allegedly improper questioning of witnesses, especially where defendant did not "identify how any particular incident might have caused prejudice").

3. ***"Were they lying" questions.***

Lynch next argues that the prosecutor asked improper "were they lying" questions of Dr. Jolie Brams and asks this Court to adopt the position that such questions are categorically impermissible, thereby overruling *State v. Morales*, 198 Ariz. 372, 10 P.3d 630 (App. 2000). (O.B. at 21–28.) Lynch did not raise this objection below. This claim fails because Lynch cannot meet his burden of proving fundamental, prejudicial error.

a. Factual background.

During her testimony, Dr. Jolie Brams, a clinical psychologist, testified that while conducting her investigation and evaluation of Lynch, she interviewed several individuals, including Lynch, Lynch's brother Jim Lynch, Kathy Keltz, a childhood babysitter for Lynch and his siblings, Kim Roon, and Lynch's uncle, also named Jim Lynch. (R.T. 7/18/12, at 112–14, 117.) Dr.

Brams based her conclusion that Lynch was raised in an atmosphere of "profound violence and neglect" in large part on these interviews. (*Id.* at 122.)

The prosecutor sought to impeach Dr. Brams by showing that she was biased because she had accepted as true any information from those she interviewed that corroborated what Lynch told her. (*See* R.T. 8/9/12, at 67–74 [closing argument re: Dr. Brams].) During Dr. Brams' cross-examination, the prosecutor asked her about a prior case where a witness stated that based on a prior meeting with the defendant, he knew that the defendant was an adult, rather than a juvenile, which was the contested issue before the court. (R.T. 7/18/12, at 189–95.) Dr. Brams testified in that case that it was "highly unlikely" that the witness could have recalled a meeting "that long ago unless some salient or meaningful event accompanied the meeting." (*Id.* at 194.) Dr. Brams further testified in that case that absent testimony "that the meeting occurred in some unique manner," she believed the witness's recollection was "a result of suggestions presented to him when he was questioned by authorities." (*Id.* at 194–95.)

The prosecutor then contrasted Dr. Brams' skepticism regarding the witness's statement in that other case with her belief in the veracity of her interview subjects in the present matter. First, the prosecutor referenced a 49–year old incident involving Lynch and his family that James Lynch, Lynch's

uncle, had testified to. (*Id.* at 197.) James Lynch had also testified that there was nothing that made the event stand out in his memory. (*Id.* at 198.) The prosecutor asked Dr. Brams if, based on that testimony and her testimony in the other case, "you would say he's not to be believed, right because you can vouch for people?" (*Id.*) The court sustained defense counsel's objection, but overruled another objection when the prosecutor rephrased the question. (*Id.*) After some back-and-forth regarding the question, Dr. Brams answered that her opinion in the other case was not comparable to her reliance on her interview subjects in the present matter. (*Id.* at 198–200.)

Next, the prosecutor asked Dr. Brams several questions about another prior case where she was asked by the defense to review the videotaped interview of a child sex crime victim and opine on the victim's veracity. (*Id.* at 200–04.) Dr. Brams' characterized her opinion in that case as going to "what factors might have impacted her statements. I never—could never talk to the court about truthfulness. That is for a jury or judge to decide." (*Id.* at 203.) The prosecutor also asked Dr. Brams whether it was correct that she believed Kimberly Roon "was telling the truth about everything?" (R.T. 7/19/12 [Fraley], at 69–70.) Dr. Brams answered that Roon "told the truth as much as she was obviously capable of telling the truth." (*Id.* at 70.)

b. Argument.

Lynch argues that the prosecutor's questions constituted "were they lying" questions and asks this Court to overrule *Morales* by holding that such questions are categorically improper. He further argues that because the prosecutor attacked Dr. Brams' testimony with the allegedly improper questions, the verdict "cannot be relied upon" and the sentence should be reversed. Because Lynch never argued below that the prosecutor's questions warranted a mistrial or new trial, this claim is reviewed for fundamental error. *See State v. Payne*, 233 Ariz. 484, 511, ¶ 104, 314 P.3d 1239, 1266 (2013) (fundamental error review applied where defendant objected to alleged juror misconduct during trial but did not argue that conduct warranted mistrial until direct appeal); *State v. Cornell*, 179 Ariz. 314, 328, 878 P.2d 1352, 1366 (1994) (reviewing for fundamental error where defendant argued on appeal that questioning of witness constituted misconduct depriving him of fair trial, but objected at trial only on grounds that question was asked and answered).

First, this Court need not address Lynch's argument that *Morales* should be overruled because the prosecutor's questions were not the type of "were they lying" questions that case address. In *Morales*, the defendant testified in direct contrast to the testimony of several police officers. 198 Ariz. at 374, ¶ 8, 10 P.3d at 632. On cross-examination, the prosecutor asked the defendant if

the police officers had lied. *Id.* Acknowledging that most jurisdictions to have considered the issue found that asking a witness whether another witness lied is categorically improper, the court found "no good reason to adopt a bright line rule that automatically permits or prohibits the type of questions at issue." *Id.* at 375, ¶¶ 10, 12, 10 P.3d at 633. Although "the safest and recommended course if for parties to refrain from asking such questions," the court of appeals noted situations where such questions may be appropriate. *Id.* at ¶¶ 12–13, 10 P.3d at 633. Finally, after observing that "'Were they lying' questions alone will rarely amount to fundamental error," the court concluded that no fundamental error had occurred because the prosecutor did not argue that the jury had to find that the officers lied to convict the defendant, the prosecutor gave the defendant an opportunity to explain the inconsistency and the defendant seized it, the trial court instructed the jurors that they were the sole judges of witness credibility, and in light of the evidence, the remarks did not deprive the defendant of a fair trial. *Id.* at 376, ¶ 15, 10 P.3d at 634.

In *Morales*, and all but one of the cases it cites on this issue, the courts addressed whether, where there was a conflict between the testimony of the defendant and state witnesses, it was proper for the prosecutor to ask the defendant on cross-examination if the state's witnesses were lying. 198 Ariz.

at 374, ¶ 8, 375, ¶¶ 10, 12–13, 10 P.3d at 632, 633.[4] That is not what occurred here. Not only was Dr. Brams not the defendant, but the prosecutor also did not ask Dr. Brams whether, due to inconsistencies between her testimony and the testimony of other witnesses, those other witnesses were lying. Instead, the context makes clear that in asking the questions, the prosecutor attempted to undermine Dr. Brams' credibility by showing that, where it suited her needs, she believed the statements of her interview subjects seemingly without question, but that in other cases, also where it suited her needs, she was skeptical of a witness's credibility. (*See* R.T. 8/9/12, at 67–73 [closing argument regarding Dr. Brams' bias and credibility].) In other words, the questions were calculated to undermine Dr. Brams' credibility by showing possible bias and by attacking her methods. No misconduct occurred because the prosecutor's questions were not "were they lying" questions.

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[4] *See United States v. Richter*, 826 F.2d 206 (2d Cir. 1987); *Freeman v. United States*, 495 A.2d 1183 (D.C.App. 1985); *Whatley v. State*, 509 S.E.2d 45, 51 (Ga. 1998); *People v. Riley*, 379 N.E.2d 746 (Ill. App. 1978); *Moss v. Commonwealth*, 949 S.W.2d 579 (Ky. 1997); *State v. Pilot*, 595 N.W.2d 511, 518 (Minn. 1999); *State v. Flanagan*, 801 P.2d 675 (N.M. App. 1990); *People v. Adams*, 148 A.D.2d 964 (N.Y. 1989); *State v. Casteneda-Perez*, 810 P.2d 74 (Wash. App. 1991). The sole exception to this fact pattern is *Fisher v. State*, 736 A.2d 1125, 1162–63 (Md. 1999), where a co-defendant's counsel asked the question of the defendant during cross-examination.

Even if the questions were improper, Lynch has not met his burden of establishing fundamental error and prejudice. *See Morales*, 198 Ariz. at 376, ¶ 15, 10 P.3d at 634 ("'Were they lying' questions alone will rarely amount to fundamental error."). Like in *Morales*, Dr. Brams had the opportunity to explain her answers and did so. (R.T. 7/18/12, at 197–200, 203–04; R.T. 7/19/12, at 70.) Moreover, the trial court instructed the jurors before and after the presentation of evidence that they were the sole triers of witness credibility. *Id.* (R.T. 7/17/12, at 30; R.T. 8/9/12, at 8.) This claim therefore fails.

4. ***Speaking objections.***

Lynch next argues that the prosecutor improperly used speaking objections "to place himself and his arguments in a better light." (O.B. at 30.) Lynch refers to several instances in which he contends the prosecutor made an improper speaking objection, none of which Lynch objected to at trial. (*Id.* at 30–31.) He cannot establish error, much less error that is fundamental and prejudicial.

Lynch does not allege, nor does the record demonstrate, that in any of the allegedly speaking objections the prosecutor: referred to matters not in evidence, *see State v. Roscoe*, 184 Ariz. 484, 497, 910 P.2d 635, 648 (1996); or placed the government's prestige behind a state witness or suggested that information not presented to the jury supported a witness's testimony. *See*

Newell, 212 Ariz. at 402, ¶ 62, 132 P.3d at 846. Instead, even if the arguments should not have been included in objections, they would not have been improper during the prosecutor's closing argument. *See Bible*, 175 Ariz. at 602, 858 P.2d at 1205 (no prejudice from argument that was improper in opening statement but would have been proper during closing argument).

Moreover, Lynch has fallen far short of establishing prejudice. For some of the objections Lynch asserts that the prosecutor attempted to "place himself and his arguments in a better light," but fails to explain how the prosecutor did so or what effect, if any, this had on the trial's outcome. (O.B. at 30.) Although Lynch claims that the prosecutor attempted to portray himself as more willing than the defense to introduce evidence by arguing that a transcript should be introduced, the trial court told the jurors after a bench conferences that "the *parties* are going to provide you with a transcript," thus giving the prosecution and defense equal credit for the information. (O.B. at 30; R.T. 7/24/12, at 53.) And insofar as Lynch complains that the prosecutor objected when defense counsel made speaking objections (O.B. at 30–31), nothing prevented Lynch from calling the trial court's attention to the prosecutor's alleged speaking objections.

Finally, the trial court instructed the jurors that the attorneys' "remarks, statements, and arguments are not evidence" and that the attorneys' objections

"should not influence you, and you should make no assumptions because of objections by the attorneys." (R.T. 7/17/12, at 30; R.T. 8/9/12, at 8–9.) *See Manuel*, 229 Ariz. at 6, ¶ 25, 270 P.3d at 833 (cautionary instructions cured any potential prejudice from prosecutor's allegedly improper questioning of witnesses, especially where defendant did not "identify how any particular incident might have caused prejudice"). Lynch's claim fails because he has failed to show error, much less fundamental, prejudicial error. *See Henderson*, 210 Ariz. at 568, ¶ 23, 115 P.3d at 608; *Bible*, 175 Ariz. at 602, 858 P.2d at 1205.

5. ***Alleged "denigration" of defense expert witnesses.***

Lynch argues that the prosecutor improperly "sought to denigrate" two defense experts, Dr. Brams and Dr. Gerald Altschuler. (O.B. at 31–39.) Specifically, he contends that the prosecutor improperly:

- Remarked in his opening statement that the standard Dr. Altschuler used to assess Lynch's life expectancy "comes from Wikipedia" (O.B. at 31–32; R.T. 7/17/12, at 103–04);
- Cross-examined Dr. Brams in the manner discussed above in addressing Lynch's contention that the prosecutor used improper "were they lying" questions (O.B. at 32–35; R.T. 7/18/12, at 196–98, 203–04);
- Cross-examined Dr. Brams regarding her initial refusal to turn over certain documents during her pretrial prosecution interview (O.B. 35–36; R.T. 7/19/12 [Fraley], at 42–49);

- Stated in response to a defense relevancy objection during his cross-examination of Dr. Altschuler that the witness was "a jack of all trades and not a master of this" (O.B. at 36; R.T. 7/23/12, at 150–51); and

- Argued in closing argument that Dr. Brams was biased, conducted an insufficient investigation, followed improper procedures, and refused to turn over documents, and then "carefully tied these accusations of wrongdoing" to defense counsel (O.B. at 37; R.T. 8/9/12, at 66–74).

At trial, Lynch did not argue that these incidents amounted to misconduct depriving him of a fair trial. Instead, the only relevant objections he lodged were to the comment in opening statement on grounds that it misstated the evidence (R.T. 7/17/12, at 104), and a few objections during the prosecutor's cross-examination of Dr. Brams (R.T. 7/18/12, at 198, 203; R.T. 7/19/12 [LeMoine], at 49). Consequently, insofar as he now argues the prosecutor's actions warrant a new trial, fundamental error review applies. *See Payne*, 233 Ariz. at 511, ¶ 104, 314 P.3d at 1266; *Cornell*, 179 Ariz. at 328, 878 P.2d at 1366.

During cross-examination of an expert, "a prosecutor cannot attack the expert with non-evidence, using irrelevant, insulting cross-examination and baseless argument designed to mislead the jury." *State v. Roque*, 213 Ariz. 193, 219, ¶ 161, 141 P.3d 368, 404 (2006) (quoting *In re Zawada*, 208 Ariz. 232, 237, ¶ 14, 92 P.3d 862, 867 (2004)). Although questioning an expert's qualifications "is proper to assist the jury in assessing the expert's credibility,"

the questioning must have some factual basis. *Id.* (citing Ethical Rule 3.4(e); *State v. Hummert*, 188 Ariz. 119, 126, 933 P.2d 1187, 1194 (1997)). Lynch cannot meet his burden on fundamental error review because no error occurred, nor can he establish that any purported error was fundamental or prejudicial.

The Wikipedia comment in opening statement was proper because it was based on evidence admitted at trial. Dr. Altschuler testified that he used the Child-Pugh classification to determine Lynch's prognosis based on his Hepatitis C-related liver disease. (R.T. 7/23/12, at 100–07.) He stated that he printed the Child-Pugh worksheet he used for his report from Wikipedia because he did not have a textbook with up-to-date Child-Pugh criteria, but explained that "the Child-Pugh score is universal." (*Id.* at 107–09.) On cross-examination, the prosecutor asked Dr. Altschuler whether he obtained the Child-Pugh standards he applied in the case from Wikipedia, and the doctor replied, "Well, that I happen to get it from Wikipedia but the Child-Pugh is—has many sites for publication." (*Id.* at 127–28.)

The prosecutor's remark in his opening statement that Dr. Altschuler used a Child-Pugh standard that "comes from Wikipedia" did not misstate the evidence because Dr. Altschuler testified that he obtained the Child-Pugh worksheet he used from Wikipedia. Nor, even if it was improper, can Lynch show a reasonable likelihood that the remark could have affected the jury's

verdict. *See Martinez*, 218 Ariz. at 426, ¶ 15, 189 P.3d at 353. Dr. Altschuler had the opportunity to explain during his testimony that the Child-Pugh standard "is the presently accepted medical community standard for assessing the prognosis of chronic liver disease, mainly cirrhosis," and that he obtained a Child-Pugh worksheet from Wikipedia because the criteria "is universal and different sites on the computer will publish them for you or allow you to access them" and he did not "have a textbook up to date with the Child-Pugh criteria." (R.T. 7/23/12, at 108–09, 123.) *See Roque*, 213 Ariz. at 229, ¶ 161, 141 P.3d at 404 (improper questioning of expert did not deprive defendant of fair trial where witness "handled the questions effectively, thereby reducing any prejudicial impact").

Moreover, the court repeatedly instructed the jurors—including in response to defense counsel's objection to these remarks during opening statement—that what the lawyers say "is not evidence." (R.T. 7/17/12, at 30, 104; R.T. 8/9/12, at 8–9.) *See State v. Gallardo*, 225 Ariz. 560, 569, ¶ 40, 242 P.3d 159, 168 (2010) (applying presumption that jurors following court's instruction and concluding that instructions cured any possible prejudice from improper comments during opening statement).

Likewise, the prosecutor's cross-examination of Dr. Brams did not amount to misconduct. As discussed more thoroughly above, the questions

regarding Dr. Brams' testimony in other cases and comparison of that testimony to the instant case was part of the prosecutor's legitimate attempt to undermine the expert's credibility by showing that when hired to do so in other cases she was skeptical of witness's ability to accurately recall events, here she took at face value the memories of individuals whose statements led her to conclude that Lynch had a troubled childhood. Because this questioning had an evidentiary basis—it was based directly on her prior testimony and her report and testimony in this case—it was not improper. *See Roque*, 213 Ariz. at 219, ¶ 161, 141 P.3d at 404 (attacks on expert witness must have some factual basis).

The prosecutor's questioning of Dr. Brams with respect to her reluctance to turn over a few documents similarly had a factual basis. During cross-examination, the prosecutor and Dr. Brams discussed an incident during her prosecution interview in which both parties noticed two pages of hand-written notes that had not previously been disclosed to the State. (R.T. 7/19/12 [Fraley], at 42–51.) Dr. Brams testified that although she did not want to turn the notes over to the prosecutor—because she had not realized she had the notes and had not given them to defense counsel—she ultimately did give them to the prosecutor and the two "discussed them at length." (*Id.* at 46, 50.)

Given Dr. Brams' answers, there is no indication that this line of questioning lacked a factual basis. *See id.*

Further, even if improper, Lynch cannot show any likelihood, much less a reasonable one, that the prosecutor's cross-examination of Dr. Brams affected the verdict. Like the expert in *Roque*, Dr. Brams "handled the questions effectively, thereby reducing any prejudicial impact." 213 Ariz. at 229, ¶ 161, 141 P.3d at 414. Moreover, the trial court sustained several defense objections during her cross-examination (R.T. 7/18/12, at 198, 203; R.T. 7/19/12 [Fraley], at 49), and also instructed the jury that the lawyers' statements were not evidence and that it should ignore statements to which objections were sustained. (R.T. 7/17/12, at 28–29, 30; R.T. 8/9/12, at 7, 8, 9.) *See Manuel*, 229 Ariz. at 6, ¶ 25, 270 P.3d at 833.

Next, the prosecutor's remark in response to defense counsel's relevance objection, during the cross-examination of Dr. Altschuler, that the expert was "a jack of all trades and not a master of this" was not misconduct, nor could it have affected the verdict. (R.T. 7/23/12, at 150–51.) The context of the statement makes clear that the prosecutor's questioning was properly attempting to demonstrate that Dr. Altschuler was a generalist, rather than an expert, in some of the topics on which he had testified; the unobjected-to comment was directly responsive to defense counsel's objection that the line of

questioning was irrelevant. Moreover, the prosecutor's comment would have been entirely proper during closing argument because it was an inference based on Dr. Altschuler's testimony. *See Bible*, 175 Ariz. at 602, 858 P.2d at 1205 (no prejudice from argument that was improper in opening statement but would have been proper during closing argument); *see also Roque*, 213 Ariz. at 219, ¶ 161, 141 P.3d at 404 (prosecutor may make factually supported attack on expert witness's qualifications). Finally, the trial court instructed the jurors that the attorneys' "remarks, statements, and arguments are not evidence" and that the attorneys' objections "should not influence you, and you should make no assumptions because of objections by the attorneys." (R.T. 7/17/12, at 30; R.T. 8/9/12, at 8–9.) *See Manuel*, 229 Ariz. at 6, ¶ 25, 270 P.3d at 833 (cautionary instructions cured any potential prejudice from prosecutor's allegedly improper questioning of witnesses, especially where defendant did not "identify how any particular incident might have caused prejudice").

The prosecutor's unobjected-to comments regarding Dr. Brams' bias and credibility during closing argument also were not improper. Although Lynch characterizes the arguments as "accus[ing] Dr. Brams of wrongdoing," in fact the prosecutor properly argued her bias and credibility. *See State v. Herrera*, 203 Ariz. 131, 137, ¶ 17, 51 P.3d 353, 359 (App. 2002) (witness's potential bias a proper subject for closing argument). The prosecutor's arguments were based

on Dr. Brams' testimony. He argued that she was biased based on her testimony that she gave presentations for defense attorney organizations, but not prosecutors. (R.T. 8/9/12, at 66 [argument]; R.T. 7/18/12, at 183–87 [testimony].) He argued she was not credible based on testimony that in other cases she purported to opine on other witness's credibility after reading those witness's statements. (R.T. 8/9/12, at 67–68 [argument]; R.T. 7/18/12, at 189–97, 200–04 [testimony].) He argued that she was biased and non-credible because in a prior case she criticized a witness interview because it was not recorded, yet failed to record her own interviews for her report in this case. (R.T. 8/9/12, at 68 [argument]; R.T. 7/18/12, at 204–07 [testimony].) He argued her illegibly written notes undermined her credibility based on her testimony that her notes were mostly illegible to anyone but her and testimony from a State expert that this made it difficult to review Dr. Brams' work. (R.T. 8/9/12, at 68 [argument]; R.T. 7/18/12, at 206–07 [Dr. Brams testimony]; R.T. 7/25/12, at 50–51 [Dr. Demarte testimony].) His argument that she did not want to turn over notes was based on her testimony that she initially refused to turn over notes that had not been previously disclosed to the State. (R.T. 8/9/12, at 68 [argument]; R.T. 7/19/12 [Fraley], at 42–51 [testimony].) And his argument that "[s]he's coming in here with a bias, which means that if it's to this defendant's benefit, she's going to slant the truth that way," was based on

the testimony recounted above, as well as testimony from the State's expert that Dr. Brams' report and testimony appeared biased because she presented information "in a way that was definitive," placed "a very strong emphasis on the negative things that happened throughout [Lynch's] childhood, but they're not necessarily so related to the negative things that he might have partaken in throughout his life," and failed to obtain any documents to corroborate her witness interviews, and that in general Dr. Brams' report and evaluation was "poorly done," "extremely problematic," "not typical practice," and failed to "give a complete clear picture of what was going on in [Lynch's] life." (R.T. 7/25/12, at 53–55.) The prosecutor's arguments regarding Dr. Brams were proper because they were based on the evidence presented at trial, and did not rely on non-evidence, irrelevant attacks, or insults. *See Roque*, 213 Ariz. at 219, ¶ 161, 141 P.3d at 404; *see also State v. Morris*, 215 Ariz. 324, 337, ¶ 58, 160 P.3d 203, 216 (2007) (prosecutor has "wide latitude" in arguing to jury).

Nor did the prosecutor, as Lynch suggests, improperly "impugn the integrity or honesty of opposing counsel," *Newell*, 212 Ariz. at 403, ¶ 66, 132 P.3d at 847, by stating, when arguing that Dr. Brams was not credible, that she was "the person that they brought in to you so that you can then take a look at this mitigating circumstance about his childhood." (O.B. at 37.) This

argument was not an accusation that defense counsel engaged in wrongdoing, but simply an argument that the defense had failed to prove a bad childhood as a mitigating factor because the witness the defense used to establish that factor was not credible.

In any event, even if Lynch established that these closing remarks were not proper, the trial court instructed the jurors at the beginning and end of the resentencing that statements by the lawyers were not evidence. (R.T. 7/17/12, at 30; R.T. 8/9/12, at 8–9.) Given these instructions, the comments could not have affected the verdict. *See State v. Velazquez*, 216 Ariz. 300, 312, ¶ 53, 166 P.3d 91, 103 (2007).

In sum, the prosecutor did not improperly attack Lynch's expert witnesses; rather, his impeachment of their credibility was based on the evidence. Even if the remarks had been improper, they cannot have affected the verdict, either individually or cumulatively, because the witnesses had the opportunity to explain themselves and the trial court instructed the jury on its role as the sole trier of witness credibility, on the statements of counsel, and on how to treat objections. Lynch's claim of misconduct therefore fails.

6. ***Alleged appeal to the jury's fears.***

Lynch argues that the prosecutor improperly appealed to the fears of the jury during his cross-examination of defense corrections expert James Aiken. (O.B. at 39–40.) For the following reasons, this claim fails.

Aiken testified that, if sentenced to life imprisonment, Lynch would not pose a threat to other inmates or staff and could be adequately managed in the prison environment. (R.T. 7/23/12, at 22–26.) During cross-examination, the prosecutor asked Aiken whether he was familiar with a relatively recent episode in which several convicted murderers escaped an Arizona prison. (*Id.* at 46–47.) Aiken responded that he was somewhat familiar with the incident, but that while "anybody in a prison can escape," the probability of Lynch doing so was "near zero as possible." (*Id.* at 47.) The prosecutor also asked whether it was possible that Lynch could "stick or prick" a corrections officer "with a sharp object," thus infecting that person with Hepatitis C. (*Id.*) Aiken answered that the "probability of that is very miniscule." (*Id.* at 48.) The prosecutor followed up by asking whether the miniscule probability would "be comfort to the person who got stuck by a needle that Shawn Lynch had used," which Aiken answered, over defense counsel's relevance objection. (*Id.*) Because Lynch's only objection was one of relevance to the final question, this issue is reviewed for fundamental error. *See State v. Lopez*, 217 Ariz. 433, 434,

¶ 4, 175 P.3d 682, 683 (App. 2008) ("[A]n objection on one ground does not preserve the issue on another ground.").

In *State v. Comer*, 165 Ariz. 413, 426–27, 799 P.2d 333, 346–47 (1990), the only case Lynch cites, this Court concluded that the prosecutor improperly appealed "to the jury's passion and prejudice" by calling the defendant a "monster," "filth," and the "reincarnation of the devil on earth." Here, the prosecutor did nothing of the sort. Unlike in *Comer*, where the prosecutor engaged in "name-calling" during closing argument that "went beyond arguing the vicious nature of appellant's acts," the prosecutor's questions here were aimed at highlighting the necessarily speculative nature of Aiken's testimony that Lynch posed no threat in prison. In light of Aiken's testimony that Lynch could be adequately managed in prison, it was not improper for the prosecutor to point out that there was no way of guaranteeing that outcome.

Even if the questions had been improper, Lynch cannot establish prejudice. Aiken responded that the probability of Lynch escaping was as "near zero as possible" and that the odds of Lynch sticking a guard with a needle was "very miniscule." (R.T. 7/23/12, at 47, 48.) Additionally, Aiken testified on redirect that prison staff take measures to avoid needle sticks, there was nothing in Lynch's record indicating "the need for that type of behavior," Lynch's record showed no escape activity, and that the escape episode the

prosecutor mentioned involved a privately-run prison. (*Id.* at 51–53.) In light of Aiken's testimony, there is no chance that the questions, even if improper, affected the verdict.

7. ***Alleged misstatements of evidence.***

Next, Lynch argues that the prosecutor misstated the evidence by attempting to present an exhibit out of context, mischaracterizing Dr. Brams' testimony in another case, and arguing that viewing pornographic movies evidenced heinousness or depravity. (O.B. at 41.) These claims fail.

Misstating evidence, "if done intentionally, would be a serious breach of the prosecutor's duty." *State v. Cannon*, 148 Ariz. 72, 77, 713 P.2d 273, 278 (1985). Thus, prosecutors may not comment on matters introduced into evidence since the jury must determine guilt or innocence based only on admitted evidence. *State v. Prince (Prince I)*, 204 Ariz. 156, 161, ¶ 23, 61 P.3d 450, 455 (2003).

First, during cross-examination, the prosecutor asked Dr. Brams whether she told him during her pretrial interview that it would be a waste of time for them to go over her notes. (R.T. 7/19/12 [Fraley], at 39–40.) When Dr. Brams answered that she did not recall, the prosecutor played an audio clip, presumably from Exhibit 541, that was not transcribed by the court reporter. (*Id.* at 40.) After playing the clip, the prosecutor said:

You're telling me it's a waste of time, right?

A. I said those words. They are completely out of context of the topics we were discussing, but I have no choice but to say, yes, those are my words.

Q. And you did say, at that point, that it was a waste of time to go through your notes, right?

A. I said that sentence. It's meaningless out of context.

(*Id.*) The prosecutor then moved to admit Exhibit 541; defense counsel objected that it was out of context, and that court denied its admission, stating, "I do believe it was somewhat out of context, and the statement is already in evidence." (*Id.*, R.T. 7/19/12 [LeMoine], at 3.) On redirect, Dr. Brams explained the context of her statement. (R.T. 7/19/12 [LeMoine], at 24–25.)

This episode involved no misstatement of evidence. Dr. Brams and the prosecutor disagreed over whether the audio clip the prosecutor played made sense in the context of the incident they were discussing. Dr. Brams explained to the jury that the statement was out of context, and the trial court sustained defense counsel's objection on that basis, precluding admission of the audio clip. Furthermore, the witness explained the relevant context during her redirect examination. Thus, even if this occurrence could somehow be construed as a misstatement of evidence, there is no possibility that it affected the verdict. *See Martinez*, 218 Ariz. at 426, ¶ 15, 189 P.3d at 353.

Next, during Dr. Brams' cross-examination, the prosecutor asked, "Well, wait a minute, didn't you tell us about a case involving a guy named Braulio Martinez yesterday where you said that he was mistaken because you can read minds?" (R.T. 7/19/12 [Fraley], at 41–42.) The trial court sustained defense counsel's objection that the question misstated the evidence. (*Id.* at 42.) When the prosecutor rephrased the question, the witness explained that her testimony in that case was that she believed "that his memory of the exact year and time that he knew that defendant, Mr. Gomez, may have been incorrect." (*Id.*)

Even if the question here inaccurately characterized Dr. Brams' prior testimony, the trial court sustained defense counsel's objection, and instructed the jurors before and after the presentation of evidence to disregard questions and exhibits that were withdrawn or to which objections were sustained. (R.T. 7/17/12, at 28–29; R.T. 8/9/12, at 7.) Furthermore, Dr. Brams explained her testimony after the prosecutor rephrased the question. Under these circumstances, there is no chance that the question affected the verdict. *See State v. Forde*, 233 Ariz. 543, 568, ¶ 104, 315 P.3d 1200, 1225 (2014) (court's instruction that lawyers' arguments are not evidence lessens impact of prosecutor's misstatement); *Morales*, 198 Ariz. at 376, ¶ 15, 10 P.3d at 634 (no prejudice from improper question where, among other factors, witness explained statement).

Finally, Detective Kevin Furia testified that at a hotel room the day after the murder, Lynch and Sehwani rented 10 pornographic movies. (R.T. 8/6/12, at 48–54.) When the defense objected that the testimony was irrelevant, the prosecutor argued that "part of the pecuniary gain [aggravating circumstance] was buying these movies, and additionally the evidence of a corrupt and evil and dark mind which goes to the defendant's quote, unquote propensities which is something that is relevant in this case." (*Id.* at 50–51.) The trial court overruled the objection and permitted the testimony. (*Id.* at 51.) During closing argument, the prosecutor argued that the movie rentals evidenced "a debasement in the part of this individual's character. And that has already been found, because this murder has been found to be especially heinous and depraved." (R.T. 8/9/12, at 65–66.) The trial court sustained defense's counsel's objection to this remark. (*Id.* at 66.)

Lynch fails to provide any argument supporting his challenge to this comment by the prosecutor, much less explain how the prosecutor's comment misstated the evidence. Consequently, he has waived appellate review of this claim. *See State v. Hargrave*, 225 Ariz. 1, 10 n.6, ¶ 22, 234 P.3d 569, 578 (2010) (failure to "present significant arguments, supported by authority," "usually constitutes abandonment and waiver of that claim") (quoting *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989)). Even if this claim

was not waived, the prosecutor was correct that previous juries had found the murder heinous, cruel, and depraved, *Lynch*, 225 Ariz. at 33, ¶¶ 12–13, 234 P.3d at 601, and the jury had been so instructed. (R.T. 7/17/12, at 34.) Insofar as Lynch argues that the prosecutor was incorrect that Lynch's "debasement" of character had already been found, he can show no reasonable likelihood that it affected the verdict. The trial court sustained defense counsel's objection and had instructed the jury that counsels' statements were not evidence and to disregard anything to which an objection was sustained, thereby protecting against any potential prejudice. *See Velazquez*, 216 Ariz. at 312, ¶ 52, 166 P.3d at 103 (no reversible error in improper comment where jury instructed to disregard statement and that lawyers' statements were not evidence).

8. ***Alleged personal attacks against defense counsel.***

Lynch incorrectly argues that during opening statements and closing arguments the prosecutor improperly engaged in personal attacks against defense counsel by characterizing aspects of Lynch's mitigation as "myth" and "fantasy." (O.B. at 41–47.) Lynch did not object to these statements, limiting review to fundamental error. Moreover, the prosecutor's arguments were proper criticism of defense theories and tactics rather than personal attacks against defense counsel.

Counsel are afforded wide latitude in closing arguments and may argue all reasonable inferences from the evidence presented. *State v. Dumaine*, 162 Ariz. 392, 401, 783 P.2d 1184, 1193 (1989). Although "it is improper to impugn the integrity or honesty of opposing counsel," *Newell*, 212 Ariz. at 403, ¶ 66, 132 P.3d at 847, "criticism of defense theories and tactics is a proper subject of closing argument." *State v. Ramos*, 235 Ariz. 230, ¶ 25, 330 P.3d 987, 995 (App. 2014) (quoting *United States v. Sayetsitty*, 107 F.3d 1405, 1409 (9th Cir. 1997)).

Applying these principles, Arizona courts have previously found improper (but not necessarily reversible) prosecutors' statements that: defense counsel knew DNA evidence is a compelling investigative tool, thus insinuating that any argument to the contrary was disingenuous, *id.*; defense counsel "fabricated" an insanity defense, *Hughes*, 193 Ariz. at 85–86, ¶¶ 58–61, 969 P.2d at 1197–98; insinuated that counsel taught the defendant how to fake epilepsy, *Cornell*, 179 Ariz. at 330–32, 878 P.2d at 1368–70; defense counsel had told a witness he believed there was no defense in the case, *State v. Hallman*, 137 Ariz. 31, 37, 668 P.2d 874, 880 (1983); defense counsel's argument was "a lie," *State v. Rosas-Hernandez*, 202 Ariz. 212, 219, ¶ 24, 42

P.3d 1177, 1184 (App. 2002)[5]; and "defense counsel is a liar," written on an easel during closing argument, *State v. Smith*, 182 Ariz. 113, 115–16, 893 P.2d 764, 766–67 (App. 1995). This Court has also held that a prosecutor's statements in closing argument that certain questions by defense counsel were "a defense ploy," "improper," and "outrageous" were "well within the wide latitude afforded both parties during closing argument." *State v. West*, 176 Ariz. 432, 446, 862 P.2d 192, 206 (1993), *overruled on other grounds by State v. Rodriguez*, 192 Ariz. 58, 691 P.2d 1006 (1998).

In *Ramos*, the defendant argued on appeal that the prosecutor acted improperly by arguing that defense counsel asked the jurors to "speculate" and "check [their] common sense at the door" and by contending that defense counsel's argument "was an attempt to divert the jurors from the relevant evidence by raising distractions or 'red herrings.'" 235 Ariz. 230, at ¶ 24, 330 P.3d at 994–95. The court of appeals found the prosecutor's arguments proper, concluding: "Although some of the prosecutor's comments suggested that

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[5] Although the court in *Rosas-Hernandez* concluded that the trial judge was within her discretion to find that argument improper, it specifically did conclude "that there are no circumstances in which one lawyer may characterize another lawyer's argument as 'a lie.'" 202 Ariz. at 219, ¶ 24, 42 P.3d at 1184.

defense counsel was attempting to mislead the jury, we cannot say that those statements did more than criticize defense tactics." *Id.* at ¶ 25.

Here, the prosecutor's characterization as "myth" and "fantasy" the defense theories that Sehwani, not Lynch, cut Panzarella's throat and that Lynch's drug use, medical condition, and childhood were mitigating was a permissible criticism of "defense theories and tactics." *Id.* In other words, the prosecutor's use of the terms "myth" and "fantasy" was simply a more descriptive way of saying that the defense's assertions and theories regarding the mitigation were not supported by the evidence, a staple of closing argument by all parties in all cases. *See State v. Anderson*, 210 Ariz. 327, 350, ¶ 97, 111 P.3d 369, 392 (2005) (""[T]here is no constitutional prohibition against the State arguing that the [mitigation] evidence is not particularly relevant or that it is entitled to little weight."). Unlike in the cases discussed above, the prosecutor did not impugn or insult opposing counsel by stating that Lynch's mitigation theories were "fabricated" by the defense or that defense counsel was a liar. By arguing that several defense theories were myth or fantasy—that is, that they were not supported by the evidence—the prosecutor did not even go so far as the prosecutor in *West*, who did not act improperly by characterizing defense questions as a "ploy," "improper," and "outrageous." 176 Ariz. at 446, 862 P.2d at 206. Because the prosecutor's criticisms were

leveled at the defense's theories and tactics, rather than at defense counsel personally, no misconduct occurred.

Lynch also argues that the prosecutor improperly impugned defense counsel by arguing that Dr. Brams, whose credibility and bias he also attacked, was the person selected by the defense to prove much of the mitigation and that the defense theory required the jurors to ignore the DNA evidence and "speculate." (O.B. at 46–47.) These criticisms, too, went to defense theories and tactics rather than defense counsel personally. As previously stated, the argument regarding Dr. Brams was not an accusation that defense counsel engaged in wrongdoing, but a contention that the defense had failed to prove Lynch's bad childhood as a mitigating factor because the witnesses upon whose testimony that factor rested was not credible. Similarly, the reference to speculation was not an accusation that defense counsel did something unethical but an argument that the defense theory, in contrast with the State's, was not supported by the evidence. *See Ramos*, 235 Ariz. 230, at ¶¶ 24–25, 330 P.3d at 994–95 (argument that defense counsel asked jurors to "speculate" was not improper).

Furthermore, the trial court protected against any potential prejudice by instructing the jurors, both at the beginning and the end of the resentencing, that the lawyers' statements and arguments were not evidence. (R.T. 7/17/12,

at 30, 104; R.T. 8/9/12, at 8–9.) Because he did not object, even if he could establish fundamental error, Lynch still would not prevail because he cannot establish prejudice in light of the trial court's protective instructions. *See Velazquez*, 216 Ariz. at 312, ¶ 53, 166 P.3d at 103 (objected-to, improper comment impugning integrity of defense expert witness not reversible in light of court's corrective instructions).

9. ***Alleged vouching.***

Lynch argues the prosecutor improperly vouched during closing argument by placing the weight of the government behind the credibility of his position and by referring to facts not in evidence. (O.B. at 51–56.) Improper vouching occurs when the prosecutor (1) "places the prestige of the government behind its [evidence]" or (2) suggests that information not presented to the jury supports the [evidence]." *Newell*, 212 Ariz. at 402, ¶ 62, 132 P.3d at 846 (bracketed text in original). The record shows that no vouching occurred.

a. The prestige of the government.

Lynch contends that the prosecutor improperly placed the prestige of the government behind the credibility of its position by stating in closing argument that: (1) Lynch "did" slash Panzarella's throat, (2) with respect to the blood and DNA analysis, the Scottsdale Police Department "did its darndest" and "tried,"

(3) the blood spatter evidence showed that Sehwani was not the killer because "[t]hose are the law" and "[t]hat's just the way it works," and (4) "by no means the State does not agree that those are mitigating circumstances." (O.B. at 51–53.) These arguments were not vouching, but rather inferences based on the evidence. Because Lynch did not object to these alleged instances of vouching, review is limited to fundamental error. *Bible*, 175 Ariz. at 601, 858 P.2d at 1204.

First, the prosecutor's statement that Lynch "did" slash Panzarella's throat did not place the government's prestige behind its evidence. The prosecutor made this statement in the context of his argument that the blood and DNA evidence showed that Lynch, not Sehwani, wielded the knife. (R.T. 8/9/12, at 48–56.) In other words, the prosecutor was properly arguing a reasonable inference from the evidence—that Lynch killed Panzarella—not vouching. *See Bible*, 175 Ariz. at 602, 858 P.2d at 1205 (counsel can comment on properly admitted evidence and "urge the jury to draw reasonable inferences from the evidence, and suggest ultimate conclusions").

Next, the prosecutor's statements regarding the police department's efforts do not constitute fundamental, prejudicial error. In context, the prosecutor was arguing his contention that Lynch was the killer by discussing

the fact that the police examined Sehwani's clothing for Panzarella's DNA, but found none:

> And the Scottsdale Police Department did its darndest to try to see whether or not James Stanley Panzarella's blood or nucleated material was on [Sehwani's shirt] so that they could then turn around and say to Michael Sehwani, even though they interviewed them that Sunday, so they could saw about Michael Sehwani, well, you were wrong. They tried.

(R.T. 8/9/12, at 50–51.) The context makes clear that the prosecutor was not placing the government's prestige behind its position, but rather emphasizing that the police looked for Panzarella's DNA on Sehwani, but did not find it.

Moreover, the court of appeals has held that "even if it is improper for a prosecutor to characterize the quality of a police investigation," an isolated statement that the police found the defendant "through good law enforcement investigation" was not so egregious as to result in a denial of due process, especially where the trial court instructed the jurors that the attorneys' statements were not evidence. *State v. Zinsmeyer*, 222 Ariz. 612, 620, ¶ 17, 218 P.3d 1069, 1077 (App. 2009), *overruled on other grounds by State v. Bonfiglio*, 231 Ariz. 371, 295 P.3d 948 (2013). Similarly, here, the prosecutor's brief statement could not have amounted to a due process violation, especially where the trial court had instructed the jurors that closing arguments were not evidence. (R.T. 7/17/12, at 30, 104; R.T. 8/9/12, at 8–9.)

Third, the prosecutor did not improperly vouch by referring to blood spatter evidence as "[t]he law" and "the way it works." In context, the prosecutor was arguing that Sehwani could not have been the killer because, given the testimony regarding blood spray from a wound like that inflicted on Panzarella (R.T. 7/24/12, at 88–89, 95–96, 103–04; R.T. 8/7/12, at 97–98, 101–03), Panzarella's blood would have ended up on the shirt Sehwani was wearing both before and after the murder. (R.T. 8/9/12, at 51–53.) Thus, he stated, "And if Sehwani, the little guy, had had his hand like that, it would have gotten his DNA material right there. Those are the law. That's just the way it works." (*Id.* at 52.)

At most, the prosecutor used an imperfect term in "law," but the context makes clear that the prosecutor did not use the term to mean the law applicable to the case, but rather in a more colloquial sense, such as the "laws" of physics or "law" of attraction. In any event, this brief remark could not have risen to the level of fundamental, prejudicial error, especially in light of the trial court's instructions that the closing arguments were not evidence. *See Zinsmeyer*, 222 Ariz. at 620, ¶ 17, 218 P.3d at 1077

Finally, the prosecutor did not vouch by saying that "the State" disagreed that Lynch's proffered mitigating circumstances were actually mitigating. (R.T. 8/9/12, at 89.) The prosecutor was simply arguing that the State's

position was that the evidence did not support Lynch's contention that the evidence showed that his mitigating circumstances were actually mitigating. It was not improper because the prosecutor's statement was limited to his discussion of the evidence presented at trial and did not suggest that he was aware of information not presented to the jury that would support a death sentence. *Cf. Ramos*, 235 Ariz. 230, at ¶ 27, 330 P.3d at 995 (prosecutor's use of the phrase "the State submits" was not vouching) (citing *United States v. Necoechea*, 986 F.2d 1273, 1279 (9th Cir. 1993)). And again, the court's instructions regarding counsel's statements not being evidence protect against any finding of this brief comment rising to fundamental, prejudicial error. *See Zinsmeyer*, 222 Ariz. at 620, ¶ 17, 218 P.3d at 1077.

b. Facts not in evidence.

Lynch also argues that the prosecutor vouched by referring to facts not in evidence when he mentioned the prior testimony of Tara Potts in closing argument. (O.B. at 54–55.) At trial, Tracy Ramsay, a driver for an escort service, testified that on the early morning of the murder, he drove an escort, Tara Potts, to Panzarella's guest house, where they met Lynch, Sehwani, and Panzarella. (R.T. 7/26/12, at 4–20.) He stated that one of the men, presumably Sehwani, greeted them after coming "from around the corner from the" main

house, and led Ramsay and Potts "around back to a smaller building in the back." (*Id.* at 10, 11–12.)

The prosecutor also introduced into evidence—and had Detective Hugh Lockerby read into the record—an excerpt from Tara Potts' prior testimony. (R.T. 8/6/12, at 22–24; Trial Exhibit 590; ROA, Item 778 [minute entry indicating Ex. 590 was admitted into evidence].) In the excerpt, Potts stated that the "little guy," again, presumably Sehwani, came from the side of the main house to greet her and Ramsay. (R.T. 8/6/12, at 23; Exhibit 590.) She also described Sehwani's appearance and attire. (R.T. 8/6/12, at 23–24; Exhibit 590.)

During his closing argument, the prosecutor discussed Potts' testimony because her description of the shirt Sehwani was wearing—before the murder—helped established that that shirt, which did not have Panzarella's blood on it, was worn by Sehwani both before and after the murder, supporting the State's theory that Lynch was the killer.[6] (R.T. 8/9/12, at 48–51.) When the prosecutor started to read Potts' testimony, defense counsel objected on

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[6] Evidence established that Sehwani was wearing the shirt while Panzarella was still alive (R.T. 8/6/12, at 23–24; Exhibit 590), and after he was murdered (R.T. 7/24/12, at 31–32; R.T. 8/6/12, at 54–55; Exhibit 561), and that Panzarella's blood was not on the shirt. (R.T. R.T. 8/6/12, at 54–55; R.T. 8/7/12, at 30–31.)

grounds that "[h]er testimony is not in evidence." (*Id.* at 49.) The trial court sustained the objection, and the prosecutor, after reminding the jurors that her testimony "was read from the witness stand, whether or not that transcript is in evidence," described her testimony regarding Sehwani's description and attire. (*Id.* at 49–50.)

The record is clear that the prosecutor did not refer to information outside of the record. Detective Lockerby read Potts' prior testimony into the record and the prosecutor admitted the excerpt of Potts' prior testimony into evidence as Exhibit 590. This appears to be the same prior testimony the prosecutor referred to in his closing. Defense counsel and the trial court were simply incorrect. No vouching occurred. Moreover, the trial court's instructions that closing arguments were not evidence and to ignore any comments to which objections were sustained protected against any prejudice. (R.T. 7/17/12, at 27, 28–29, 30; R.T. 8/9/12, at 7, 8, 9.) *See Manuel*, 229 Ariz. at 6, ¶ 25, 270 P.3d at 833.

10. ***Allegedly incorrect legal standards.***

Lynch argues that throughout his closing argument, the prosecutor urged the jury to apply incorrect legal standards. (O.B. at 56–66.) Although "[e]ach side is permitted to argue its version of the evidence to the jury," the

prosecutor "may not misstate the law to the jury." *State v. Serna*, 163 Ariz. 260, 266, 787 P.2d 1056, 1062 (1990). Lynch's contentions are without merit.

a. The (G)(1) mitigating circumstance.

Lynch first argues that the prosecutor misstated the law regarding the (G)(1) mitigating circumstance, which states that a mitigating circumstance exists if "[t]he defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution." A.R.S. § 13–751(G)(1). The record shows that no misstatement occurred.

During his closing argument, the prosecutor argued, "But in order for to fail to conform or appreciate the wrongfulness of your conduct, don't you have to admit the conduct? How can you say, well, I admit—you know, I have this––" when defense counsel objected that the prosecutor misstated the instruction. (R.T. 8/9/12, at 62–63.) The trial court overruled the objection, and the prosecutor went on to say, "How can he have it both ways? He can't have it both ways. He can't say I fail to appreciate the wrongfulness of my conduct and not admit the conduct." (*Id.* at 63.) The prosecutor then argued that Lynch's behavior after the murder—leaving the scene and taking the murder

weapon, which was not found at the scene—demonstrated that Lynch appreciated the wrongfulness of his conduct and that the murder itself evidenced Lynch's appreciation because he killed the only person who could identify him and Sehwani to the police. (*Id.* at 63–64.)

The prosecutor did not misstate the law. Insofar as Lynch asserts that the prosecutor was wrong because a defendant may fail to appreciate the wrongfulness of their conduct as an accomplice, that would have been a valid argument for defense counsel to make in rebuttal, but does not mean that the prosecutor misstated the law. Rather, the prosecutor was simply pointing out a possible inconsistency in Lynch's position. More importantly, the prosecutor's argument that Lynch's actions after the murder demonstrated that the (G)(1) factor was not applicable here was a reasonable inference from the evidence and legally correct. *See State v. Sansing*, 206 Ariz. 232, 239, ¶ 26, 77 P.3d 30, 37 (2003) ("A defendant's claim of alcohol or drug impairment fails when there is evidence that the defendant took steps to avoid prosecution shortly after the murder, or when it appears that intoxication did not overwhelm the defendant's ability to control his physical behavior.") (quoting *State v. Reinhardt*, 190 Ariz. 579, 591–92, 951 P.2d 454, 466–67 (1997)).

In any event, the trial court accurately instructed the jurors on the (G)(1) mitigating circumstance, that Lynch's conviction of murder was unrelated to

the existence of mitigating circumstance and that the jurors must give independent consideration to the mitigation despite the conviction, that what the lawyers' say in their closing arguments is not evidence, and that the law they must apply was set forth in the court's instructions. (R.T. 8/9/12, at 10–11, 14–15, 16.) Consequently, even if the prosecutor had misstated the law, Lynch cannot show that it rendered his trial unfair. *Anderson*, 210 Ariz. at 342, ¶¶ 50–52, 111 P.3d at 384 (prosecutor's misstatements of law regarding aggravating factors was not fundamental error where court instructed the jury on those factors and also instructed jury that the applicable law was contained in the instructions and that lawyers' statements were not evidence).

b. Substance abuse.

Lynch next argues that the prosecutor misstated the law regarding substance abuse as a mitigating factor. In addition to the instructing the jurors on the (G)(1) mitigating factor and that substance or drug abuse could cause significant impairment, the court also instructed that Lynch proposed as a mitigating factor that he suffered from drug abuse. (R.T. 8/9/12, at 14–15.) The prosecutor argued in his closing that Lynch's history of drug abuse was not mitigating, stating that drug abuse as mitigation was "upside down" logic because drug abuse is "a bad thing" and an "unlawful act." (*Id.* at 64–65.)

Lynch contends that the prosecutor's argument misstated the law because this Court has considered a history of drug abuse as a mitigating circumstance. *See, e.g., Velazquez*, 216 Ariz. at 314–15, ¶ 73, 166 P.3d at 105–06. But that does not mean that a prosecutor cannot argue that drug use is not mitigating or should not receive mitigating weight. Rather, nothing prohibits a prosecutor's argument "that the [mitigation] evidence is not particularly relevant or that it is entitled to little weight." *See Anderson*, 210 Ariz. at 350, ¶ 97, 111 P.3d at 392. Furthermore, Lynch is incorrect that the prosecutor invited the jury to view Lynch's drug abuse as "aggravation." (O.B. at 58.) The context of the prosecutor's statements makes clear that he simply argued that the evidence of drug abuse was not particularly mitigating.

Finally, especially because Lynch did not object to this line of argument, the trial court's instructions, listed above with respect to prosecutor's argument regarding the (G)(1) factor, prevent Lynch from demonstrating prejudce under fundamental error review, even if the prosecutor's statements could be interpreted as a misstatement of law. *Id.* at 342, ¶¶ 50–52, 111 P.3d at 384.

c. Pornographic videos.

Lynch also argued, as addressed above, that this same comment regarding the rental of pornography was a misstatement of the evidence. (O.B. at 58.) His two-sentence argument here, alleging that the prosecutor's remark

also misstated the law, fails to explain how the prosecutor misstated the law or to set forth any argument that the comment constituted reversible error despite the trial court's sustaining defense counsel's objection to it. As a result, this claim is waived. *See Hargrave*, 225 Ariz. at 10 n.6, ¶ 22, 234 P.3d at 578; *Carver*, 160 Ariz. at 175, 771 P.2d at 1390.

Insofar as Lynch contends the prosecutor was incorrect that the pornography was related to the (F)(6) aggravating factor, the prosecutor cured any error by correctly noting that the (F)(6) aggravating circumstance had already been found, *Lynch*, 225 Ariz. at 33, ¶¶ 12–13, 234 P.3d at 601, and legally correct that the current jury could not retry the existence of aggravating factors. *See* A.R.S. § 13–752(K) (subsequent penalty phase jury may not retry "the issue regarding any of the aggravating circumstances that the first jury found by unanimous verdict to be proved or not proved"). Further, to the extent the prosecutor's argument suggested that evidence of Lynch's character was relevant to the sentencing determination, he was also correct. *See* A.R.S. § 13–752(G) (during the penalty phase, the State may present "any evidence that is relevant to the determination of whether there is mitigation sufficiently substantial to call for leniency" and "any evidence that demonstrates that the defendant should not be shown leniency including any evidence regarding the defendant's character ").

Finally, even if Lynch had not waived this claim and there was a misstatement, he cannot show that it rendered his trial unfair given that the trial court sustained defense counsel's objection and accurately instructed the jury on aggravation and mitigation, sustained objections, and that the lawyers' statements were not evidence. (R.T. 8/9/12, at 7–9, 10–16, 66.) *See State v. Prince (Prince II)*, 226 Ariz. 516, 539, ¶ 92, 250 P.3d 1145, 1168 (2011) (several instances of possible misconduct, including misstatement of law, did not deprive defendant of fair trial "particularly in view of the trial court's sustaining defense objections and giving curative instructions to the jury"); *Anderson*, 210 Ariz. at 342, ¶¶ 50–52, 111 P.3d at 384.

d. Dysfunctional childhood.

Lynch contends the prosecutor misstated the law by arguing that Lynch's dysfunctional childhood was "an excuse, not a mitigating factor." (O.B. at 59.) Lynch misconstrues the prosecutor's argument as stating that, as a matter of law, a dysfunctional childhood is never a mitigating circumstance. Such an argument would be legally wrong. *See, e.g., Prince II*, 226 Ariz. at 541, ¶ 109, 250 P.3d at 1170 ("A difficult or traumatic childhood is a mitigating circumstance."). But that is not what the prosecutor argued. Viewed in context, the prosecutor's several-page argument asserted that because Lynch was 40 years old at the time of the murder, his childhood was not particularly

mitigating in this case, that is, it was not entitled to any mitigating weight: "At some point [Lynch's childhood] is all so remote that all it is, when you bring it out to the light, it's an excuse, not a mitigating factor." (R.T. 8/9/12, at 73–75 [quote at 74].) This Court has repeatedly observed that a defendant's age has an attenuating effect on the mitigating weight to be afforded a difficult childhood. *E.g., Prince II*, 226 Ariz. at 541–42, ¶ 111, 250 P.3d at 1170–71. The prosecutor's argument was therefore proper and did not misstate the law. *See Anderson*, 210 Ariz. at 350, ¶ 97, 111 P.3d at 392 (prosecutor may argue "that the [mitigation] evidence is not particularly relevant or that it is entitled to little weight").

e. Life sentence.

Lynch also argues that the prosecutor misstated the law by characterizing a life sentence for Lynch as a "free bite at the apple." (O.B. at 59.) The prosecutor did not misstate the law.

Before the closing arguments began, the trial court instructed the jurors that one of the proffered mitigating circumstances was that Lynch had received a 21–year sentence for kidnapping, armed robbery, and burglary that he would have to serve consecutively to whatever sentence he received for the murder. (R.T. 8/9/12, at 15–16.) Defense counsel argued in closing that this additional sentence alleviated any concern that Lynch would ever be released from prison,

even if his sentence for the murder was life with the possibility of release after 25 years: even in the unlikely event that Lynch obtained release after 25 years for the murder, he would still have to serve 21 additional years. (*Id.* at 45.) The prosecutor argued in response that to mitigate Lynch's sentence for the murder because he had committed and been sentenced for other crimes would give Lynch "a free bite of the apple." (*Id.* at 77–78.) In other words, to find his other sentences mitigating would have the perverse effect of rewarding Lynch for having committed other crimes in addition to the murder.

Lynch's assertion that the prosecutor's argument somehow implicated and misstated the law surrounding double jeopardy is incorrect. The prosecutor was making a moral argument, not a legal one. *See Blystone v. Pennsylvania*, 494 U.S. 299, 316 (1990) ("[T]he decision to impose the death penalty must reflect a reasoned moral judgment about the defendant's actions and character in light of all the circumstances of the offense and the defendant's background."). Lynch is also incorrect that by arguing that the other sentences were "not a mitigating circumstance" (R.T. 8/9/12, at 78), the prosecutor incorrectly told the jurors that they could not consider the other sentences as mitigation. (O.B. at 60.) Like the prosecutor's argument regarding drug abuse, viewed in context, the prosecutor's argument is more accurately characterized as stating that, under the circumstances here, Lynch's 21–year sentence was not

mitigating or not entitled to any mitigating weight. This was proper argument. *See Anderson*, 210 Ariz. at 350, ¶ 97, 111 P.3d at 392.

And once again, Lynch cannot demonstrate fundamental error from the prosecutor's unobjected-to remark in light of the trial court's instructions that the other sentences were a proffered mitigating factor, the lawyers' statements were not evidence, and that the jury must give independent consideration to all of the mitigating evidence. (R.T. 8/9/12, at 8, 10–11, 15–16.) *See Anderson*, 210 Ariz. at 342, ¶¶ 50–52, 111 P.3d at 384.

f. (F)(6) aggravating circumstance.

Finally, Lynch argues that the prosecutor repeatedly stated incorrectly that cruelty, heinousness, and depravity constituted multiple aggravating circumstance rather than a single aggravator. He has not shown any intentional misconduct, much less of a reversible nature.

The (F)(6) aggravating circumstance exists if "[t]he defendant committed the offense in an especially heinous, cruel or depraved manner." A.R.S. § 13–751(F)(6). "[T]he (F)(6) aggravator is a single aggravating circumstance that can be established in alternative ways." *Lynch*, 225 Ariz. at 42, ¶ 84, 234 P.3d at 610. It is therefore error, for example, to instruct the jury that findings of heinousness, cruelty, or depravity constitute multiple aggravators—even if all three are found proven there is still only one

aggravating factor. *See id.* Accordingly, the trial court instructed the jurors on (F)(6) as a single aggravating circumstance. (R.T. 7/17/12, at 34; R.T. 8/9/12, at 11–12.)

During voir dire the prosecutor began a discussion of the (F)(6) aggravator by explaining that the murder being committed "in an especially cruel, especially heinous or especially depraved" was "one aggravating factor." (R.T. 7/10/12, at 75–76.) When the prosecutor began explaining the previous juries' findings on this factor, defense counsel objected that he was "singling out one prong." (*Id.* at 76.) The court told the prosecutor to make sure it was clear to the jurors that it was only one aggravating circumstance, and denied the defense's motion to strike the prosecutor's comments. (*Id.* at 76–77.)

The prosecutor then told the prospective jurors that the "second [aggravating] factor" was "only one factor," asking, "does anybody have any misconception that the second factor is only one factor?" (*Id.* at 77.) Prompted by the court to remind the jury which factor he was addressing, the prosecutor said:

> The second factor is especially cruel, heinous or depraved, that is how it is defined. It can be found either by being cruel, heinous or depraved. What you're going to hear, and *it's just one factor*, that it was found to be especially heinous, especially cruel and especially depraved, *but it is one factor* and it can be proven by—in the disjunctive—or—

(*Id.* at 78.) (Emphasis added.) Defense counsel objected to the prosecutor's use of "and," and the trial court sustained the objection. (*Id.* at 78.)

During closing argument, the prosecutor discussed the "*two* aggravating" factors, (F)(5) and (F)(6), beginning with (F)(6): "Well, the first *one* is the defendant committed the murder in an especially heinous, cruel or depraved manner." (R.T. 8/9/12, at 80.) (Emphasis added.) The prosecutor then addressed cruelty, explaining that cruelty addressed the victim's pain and suffering and stating that especial cruelty had "been established." (*Id.* at 80–81.) Next, the prosecutor briefly addressed the "heinous *or* depraved issue," explaining that those terms addressed the defendant's state of mind and stating, consistent with the jury instructions, that the previous jury had found the murder committed in such a manner. (*Id.* at 81.) Finally, before moving on to a discussion of the proffered mitigation, the prosecutor addressed the pecuniary gain factor. (*Id.* at 81–82.)

Lynch is simply wrong that the prosecutor presented the especially cruel, heinous, or depraved aggravator as multiple factors. Both during voir dire and closing argument, the prosecutor was clear that (F)(6) was a single aggravating factor, specifically referring to it in his closing argument as the "first *one*" of the two aggravating factors. (*Id.* at 80.) Nothing in the prosecutor's statements approached the misstatement in the previous penalty phase trial that the cruelty,

heinousness, and depravity were "three aggravating factors." *Lynch*, 225 Ariz. at 42, ¶ 83, 234 P.3d at 610. Lynch seems to take issue with the prosecutor addressing the separate (F)(6) prongs. But although this Court has held that the aggravator may be proven in multiple ways, Lynch has identified no authority prohibiting the State from alleging all three prongs or, if more than one are proven, requiring it to choose only one to mention in arguing for a death sentence. Because the prosecutor did not present the three prongs as three separate aggravators, no misstatement occurred.

Additionally, Lynch cannot establish fundamental error because he did not object to this aspect of the closing argument, and, as stated above, the trial court correctly instructed the jurors on (F)(6) as one aggravating circumstance. *See Anderson*, 210 Ariz. at 342, ¶¶ 50–52, 111 P.3d at 384.

11. ***Lynch's decision not to testify.***

Lynch contends that, in closing argument, the prosecutor commented on his refusal to testify. (O.B. at 66–68.) The prosecutor's remarks did not implicate Lynch's exercise of his Fifth Amendment rights.

A prosecutor is prohibited by the United States and Arizona constitutions, and Arizona statute, from making any comment about a criminal defendant's failure to testify. *See* U.S. Const. amend. V ("No person ... shall be compelled in any criminal case to be a witness against himself[.]"); Ariz.

Const. art., 2, § 10 ("No person shall be compelled in any criminal case to give evidence against himself[.]"); A.R.S. § 13–117(B) ("The defendant's neglect or refusal to be a witness in his own behalf shall not in any manner prejudice him, or be used against him on the trial or proceedings."); *see also Griffin v. California*, 380 U.S. 609, 613–14 (1965); *State v. Rutledge*, 205 Ariz. 7, 12, ¶ 26, 66 P.3d 250, 255 (2003); *State v. Smith*, 101 Ariz. 407, 410, 420 P.2d 278, 281 (1966). "Whether a prosecutor's comment is improper depends upon the context in which it was made and whether the jury would naturally and necessarily perceive it to be a comment on the defendant's failure to testify." *Rutledge*, 205 Ariz. at 13, ¶ 33, 66 P.3d at 56. "To be constitutionally proscribed, a comment must be adverse; that is, it must support an unfavorable inference against the defendant and, therefore, operate as a penalty imposed for exercising a constitutional privilege." *State v. Mata*, 125 Ariz. 233, 238, 609 P.2d 48, 53 (1980).

Here, the prosecutor did not make any comment on Lynch's failure to testify during his penalty phase retrial. Lynch challenges two questions posed by the prosecutor in closing argument: "What's going on?" and "Were words exchanged?" (O.B. at 68.) Viewed in context, it is clear that these questions were by no means aimed to point out to the jury that Lynch had not testified. *See Rutledge*, 205 Ariz. at 13, ¶ 33, 66 P.3d at 56.

The two questions came during the prosecutor's recounting of the evidence surrounding the murder, specifically, the mental anguish Panzarella experienced:

> Well, the nightmare is just about to begin. Because then this individual here grabs a knife. It's just an ordinary kitchen knife that you have there. He's tied up. No indication that Mr. Panzarella was visually impaired. He had to be watching. ***What's going on?*** He can't do a thing with this guy sitting in this courtroom with a knife. ***Were words exchanged?*** Who knows. But there certainly was at that point mental anguish beyond description. No one can certainly put a measure on it. No one has come back to tell us about that experience. But what is he thinking about? He's thinking about something. He's got this huge threat.

(R.T. 8/9/12, at 86.) (Emphasis added.) Lynch's counsel did not object.

Lynch compares the two questions here to improper comments in *State v. Decello*, 113 Ariz. 255, 258, 550 P.2d 633, 636 (1976), where the prosecutor stated that "no one got up on this stand and testified to you contrary to what was testified to you by the witnesses," and *State v. Trostle*, 191 Ariz. 4, 16, 951 P.2d 869, 881 (1997), where the prosecutor stated that only two people knew details of the crime, an accomplice and the person "sitting right here at the table asking you not to hold him accountable through his lawyer." The prosecutor's statements here were nothing like the comments on the failure to testify in those cases.

In context, the prosecutor's first question, "What's going on?" did not suggest that Lynch failed to answer that question, but was meant to highlight that after Panzarella was tied up and Lynch came toward him with a knife, Panzarella would have wondered what was happening. *See Hargrave*, 225 Ariz. at 17, ¶ 70, 234 P.3d at 585 (cruelty can be proven by victim's "mental anguish," which "includes a victim's uncertainty about her ultimate fate"). While the second remark—"Were words exchanged? Who knows"—might be a closer call, it too, in context, appears to be aimed at highlighting Panzarella's mental anguish, not that Lynch failed to testify, given the prosecutor's immediate comments after these statements regarding the victim's mental anguish. Furthermore, unlike in *Trostle*, the prosecutor did not state that Lynch knew the answers to the questions he posed. Viewed in context, the jury would not have interpreted the remarks as a comment on Lynch's failure to testify.

Even if the brief remarks could be construed as a comment on Lynch's failure to testify, Lynch still cannot prevail because he cannot show that absent the comment a reasonable jury could have reached a different result. *See Ramos*, 235 Ariz. 230, at ¶¶ 17–18, 330 P.3d at 993 (reviewing comment on defendant's failure to testify for fundamental error where there was no objection). Lynch admits as much, stating that "such comment, in isolation, might not be sufficient to warrant reversal." (O.B. at 68.) Even if the remarks

were interpreted as a comment on Lynch's failure to testify, they were ambiguously connected to that failure at best. Moreover, the trial court instructed the jurors at the beginning and end of the sentencing proceeding that they could not hold it against Lynch if he chose not to make a statement, Lynch was not required to testify or make a statement and they were precluded from drawing any inferences against him if he decided not to do so, and that the attorneys' remarks were not evidence. (R.T. 7/17/12, at 28, 30, 31; R.T. 8/9/12, at 8, 9–11.) Under these circumstances, Lynch cannot prove prejudice. *See Trostle*, 191 Ariz. at 16, 951 P.2d at 881 (comment on defendant's failure to testify harmless beyond reasonable doubt in light of overwhelming evidence of guilt and context of statement); *Mata*, 125 Ariz. at 238, 609 P.2d at 53 (no reversible error where prosecutor commented on failure to testify but trial judge took corrective action and instructed on right not to testify).

12. ***Alleged "personalization."***

In his last claim of misconduct, Lynch argues that the prosecutor improperly invited the jurors to place themselves in the shoes of the victim. (O.B. at 69–72.) It is improper for a prosecutor to invite the jurors to put themselves in the place of the victim. *Morris*, 215 Ariz. at 337, ¶¶ 57–60, & 337 n.6, 160 P.3d at 216 & 216 n.6 (improper to single out jurors and ask if they wanted to volunteer to have the defendant sit on their chests and strangle

them with their hair or a tie); *State v. Sowards*, 147 Ariz. 185, 192, 709 P.2d 542, 549 (App. 1984).

Lynch identifies two comments, one in opening statement and one in closing argument, in which he argues the prosecutor invited the jurors to place themselves in the victim's place. First, during opening statement, while describing the murder, the prosecutor stated: "I don't think you can even imagine what it's like for somebody to approach you with a knife. You cannot move and you know they're manhandling you and they are going to cut your throat." (R.T. 7/17/12, at 93.) Defense counsel objected, arguing that the prosecutor was "placing the jury in a position that—" when the trial court interrupted, sustaining the objection. (*Id.*) The court then granted defense counsel's motion "to strike that last portion." (*Id.*)

The record shows that this comment cannot have affected the verdict nor deprived Lynch of a fair trial. This court has previously held that the proper remedy for an improper comment "is objection, motion to strike, and an instruction that the jury should disregard the improper comment." *Newell*, 212 Ariz. at 403, ¶ 69, 132 P.3d at 847 (quoting *State v. Vincent*, 159 Ariz. 418, 424, 768 P.2d 150, 156 (1989)). That procedure occurred here. Insofar as the prosecutor's statements invited the jury to place themselves in the victim's place, defense counsel immediately objected, and the court granted the

objection and struck the comment. (R.T. 7/17/12, at 93.) In light of this corrective action, combined with the court's instructions shortly before the opening statements and at the end of the trial that any sustained objection meant that the information must be disregarded (*id.* at 28–29; R.T. 8/9/12, at 7), the comment could not have affected the verdict. *See id.* (prosecutor's improper remarks impugning integrity of defense counsel did not affect verdict where trial court ordered comments stricken and instructed jurors at end of trial to ignore information to which an objection was sustained).

Second, during closing argument, the prosecutor concluded:

> So I will leave you a close—with a line by a poet by the name of John Donne who indicated that every person's death diminishes, so therefore send no one to find for whom the bell tolls, it tolls for thee. In this case, it tolls for each and every one of you—in light of the fact that there are no mitigating circumstances and if there are, they're so remote. They are of such little value. But it tolls for each and every one of you, in light of the evidence in this case, to return a verdict of death on Shawn Patrick Lynch.

(R.T. 8/9/12, at 89.) There was no objection.

Nothing in this statement invited the jurors to place themselves in the role of the victim. Instead, the prosecutor was arguing that the facts presented invited the jurors to sentence Lynch to death. In order to support his argument that the comments were improper, Lynch relies on material that should not be considered because it was not presented to the jury and is not part of the record

on appeal. (O.B. at 71–72.) *State v. Schackart*, 190 Ariz. 238, 247, 947 P.2d 315, 324 (1997) (this Court generally does not "consider materials that are outside the record on appeal"); *Martin v. State*, 22 Ariz. 327, 328, 197 P. 578, 579 (1921) ("We cannot consider any evidence outside of that contained in the record on appeal."). On this record, Lynch cannot meet his burden of establishing "both that fundamental error exists and that the error in his case caused him prejudice." *Morris*, 215 Ariz. at 337, ¶ 59, 160 P.3d at 216 (quoting *Henderson*, 210 Ariz. at 567, ¶ 20, 115 P.3d at 607). Not only was the comment not improper, but Lynch has failed to assert, much less affirmatively establish, that "this isolated incident of [alleged] impropriety denied him a fair trial or deprived him of a right essential to his defense." *Id.* at 338, ¶ 60, 160 P.3d at 217

13. ***Lynch has not shown any intentional misconduct.***

Although Lynch acknowledges that "[t]he focus" in addressing allegations of prosecutorial misconduct "is on the fairness of the trial, not the culpability of the prosecutor," *Bible*, 175 Ariz. at 601, 858 P.2d at 1204, he nonetheless refers to other cases tried by the same prosecutor in an attempt to show that the prosecutor here engaged in knowing and intentional misconduct. (O.B. at 72–79.) Primarily, Lynch's attempt is irrelevant because, as demonstrated above, Lynch has not shown any "intentional conduct which the

prosecutor knows to be improper and prejudicial, which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial," *Aguilar*, 217 Ariz. at 239–40, ¶ 11, 172 P.3d at 426–27, nor any misconduct that "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Hughes*, 193 Ariz. at 79, 969 P.2d at 1191.

Even so, his effort to establish the prosecutor's culpability fails. Lynch cites to the previous direct appeal in this case and four other cases tried by the prosecutor here, *State v. Dixon*, 226 Ariz. 545, 250 P.3d 1174 (2011); *Gallardo*, 225 Ariz. 560, 242 P.3d 159; *State v. Andriano*, 215 Ariz. 497, 161 P.3d 540 (2007); and *Morris*, 215 Ariz. 324, 160 P.3d 203. Nothing in those cases establishes that intentional misconduct occurred here.

Lynch's reference to allegations of misconduct in the prior appeal in this matter does not help his cause because this Court concluded that 6 of Lynch's 7 misconduct allegations from the aggravation phase were not misconduct, *Lynch*, 225 Ariz. at 38–39, ¶¶ 55–64, 234 P.3d at 606–07, and that the remaining allegation was, at most, a non-prejudicial "technical misstatement." *Id.* at 39, ¶ 60, 234 P.3d at 607 And because this Court remanded for a new penalty phase, it did not address Lynch's allegations of misconduct during the penalty phase. *Id.* at 43 n.8, ¶ 88, 234 P.3d at 611 n.8.

Neither does *Dixon* further Lynch's position. In that case, this Court found no misconduct and concluded that the defendant's allegation that the prosecutor "misled the trial court finds no support in the record." 226 Ariz. at 549, ¶¶ 6–11, 250 P.3d at 1178. *Andriano* is also unhelpful to Lynch because the defendant there did "not allege prosecutorial misconduct." 215 Ariz. at 503 n.3, 161 P.3d at 546 n.3. Although the defendant alleged that "[t]he prosecutor took every opportunity to infuse the trial with marginally relevant information about Andriano's partying and man-chasing," this Court found that the prosecutor's references to that information in closing argument did "not render unfairly prejudicial evidence that is otherwise properly admitted." *Id.* at 503, 161 P.3d at 546.

Lynch finally relies on this Court's conclusions in *Gallardo* that the prosecutor improperly asked the jurors to compare the victim to the defendant and in *Morris* that he improperly asked the jurors to place themselves in the position of the victim, to support his argument that the prosecutor improperly asked the jurors to place themselves in the position of the victim in this case. (O.B. at 75–77.) But, as discussed above, the prosecutor's remark in opening statement was stricken from the jury's consideration and his allegedly objectionable remark in the closing argument was not improper. Similarly, Lynch's reliance on this Court's finding in *Gallardo* that the prosecutor

misstated evidence during closing argument does not help him here because, as argued above, the prosecutor did not misstate the evidence in this case. In sum, the record here does not reflect any intentional misconduct, much less intentional misconduct that deprived Lynch of a fair trial. *See Hughes*, 193 Ariz. at 79, 969 P.2d at 1191.

14. ***Cumulative effect.***

In addressing claims of prosecutorial misconduct, this Court considers whether "persistent and pervasive" misconduct occurred and whether the "cumulative effect of the incidents shows that the prosecutor intentionally engaged in improper conduct and did so with indifference, if not a specific intent, to prejudice the defendant." *Morris*, 215 Ariz. at 339, ¶ 67, 160 P.3d at 218 (quotation omitted). Lynch does not argue that cumulative misconduct shows that the prosecutor intentionally engaged in improper conduct with indifference or intent to prejudice his trial. Accordingly, any such argument is waived. *See Hargrave*, 225 Ariz. at 10 n.6, ¶ 22, 234 P.3d at 578; *Carver*, 160 Ariz. at 175, 771 P.2d at 1390. In any event, as demonstrated above, the record in this case shows that there was no "persistent and pervasive" misconduct, nor any intentionally improper conduct, much less that which cumulatively prejudiced Lynch's ability to receive a fair trial.

II

THE TRIAL COURT DID NOT ERR BY FOLLOWING THIS COURT'S ORDER AND DENYING LYNCH'S MOTION TO RETRY THE AGGRAVATING FACTORS. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY PRECLUDING THE GUILT-PHASE VERDICT FORM AS IRRELEVANT TO MITIGATION.

Lynch argues that the trial court erred by denying his motions to retry the aggravating circumstances and to offer the first jury's guilty verdict as mitigation. (O.B. 80–95.) Not only did Lynch waive his claim regarding the retrial of aggravating circumstances by failing to challenge this Court's prior order, but the remand was properly limited to penalty phase issues. Also, the trial court did not abuse its discretion in precluding the guilt-phase verdict form as mitigation evidence because the manner in which the first jury found that Lynch committed first degree murder was irrelevant to whether there was mitigation sufficiently substantial to call for leniency.

A. THE TRIAL COURT CORRECTLY DENIED LYNCH'S MOTION TO RETRY THE AGGRAVATING CIRCUMSTANCES.

1. *Factual and procedural background.*

In Lynch's prior appeal, this Court concluded that the trial court erred by instructing the jury that because all three *prongs* of the (F)(6) aggravating factor were found proven, "three separate (F)(6) aggravating *circumstances* were proved." *Lynch*, 225 Ariz. 42, ¶ 84, 234 P.3d at 610. In discussing the appropriate remedy, the Court observed:

> The jury here properly found both the (F)(5) and (F)(6) aggravators. The error in this case arises not from an improper aggravation finding, but rather from the trial court's faulty instruction *in the penalty phase* that the jury should treat the case as involving four aggravators and the prosecutor's highlighting of that instruction during arguments exacerbated the error. Under these circumstances, § 13–755(B) does not authorize independent reweighing. Rather, we are constrained to remand for a new penalty phase trial before a properly instructed jury.

Id. at 42–43, ¶ 88, 234 P.3d at 610–11 (emphasis added). Thus, this Court concluded: "For the reasons above, we affirm the convictions and non-capital sentences, but remand for a new penalty phase proceeding on the murder conviction. Any new penalty phase jury should be instructed that the (F)(5) and (F)(6) aggravators have been previously found and that it is not to retry those issues. *See* A.R.S. § 13–752(K)." *Id.* at 43, ¶ 89, 234 P.3d at 611.

Lynch did not challenge this Court's June 22, 2010, opinion in a motion for reconsideration. (ROA, Item 616.) Instead, on remand, more than a year after this Court remanded the case for a new penalty phase, Lynch filed a motion in the trial court arguing that he was also entitled to a retrial of the aggravating circumstances. (ROA, Item 637.) Relying on this Court's opinion, the trial court denied Lynch's motion: "this Court must follow the Supreme Court's instructions, which are clear and unambiguous." (ROA, Item 684, at 4.) The trial court instructed the jurors that it had already been determined that Lynch was guilty of first degree murder, that two aggravating factors existed,

and that Lynch was a major participant in the commission of the underlying felonies and was recklessly indifferent to Panzarella's life. (R.T. 7/17/12, at 33–36.)

Lynch first argues that the trial court erred because A.R.S. § 13–752(N) mandated a full resentencing, including retrial of the aggravating factors, on remand. This argument is waived, and he is mistaken.

2. *Lynch's argument is waived.*

Lynch waived the argument that he was entitled to a retrial on the aggravating circumstances by failing to move for reconsideration of this Court's prior opinion specifically limiting retrial to a new penalty phase and prohibiting retrial of the aggravating factors. The trial court had no authority to grant Lynch's motion in light of the specific language of this Court's opinion. *See Tovrea v. Superior Court*, 101 Ariz. 295, 297, 419 P.2d 79, 81 (1966) (superior court lacks jurisdiction to review appellate court's determination and is bound by appellate court's decisions). Thus, the proper avenue for Lynch to obtain relief was not by motion to the trial court, but rather to move this Court to reconsider its order remanding for a penalty phase retrial only. *See* Ariz. R. Crim. P. 31.18 (governing motions for reconsideration). Lynch failed to do so. (ROA, Item 616.) Further, Lynch's failure to do so is prejudicial to the state.

If he were to obtain relief now, it would come after the State incurred the expense of the penalty phase retrial that he is now appealing, when he could have obtained that corrective relief before the retrial took place. Under the circumstances, this Court should find Lynch's argument waived.

3. ***Arizona law did not require retrial of aggravating factors.***

Even if this claim were not waived, Lynch is mistaken that § 13–752(N) entitled him to a retrial of aggravating factors. Section 13–752(K) states:

> At the penalty phase, if the trier of fact is a jury and the jury is unable to reach a verdict, the court shall dismiss the jury and shall impanel a new jury. The new jury shall not retry the issue of the defendant's guilt or the issue regarding any of the aggravating circumstances that the first jury found by unanimous verdict to be proved or not proved. If the new jury is unable to reach a unanimous verdict, the court shall impose a sentence of life or natural life on the defendant.

Section 13–752(N) states that:

> If the sentence of a person who was sentenced to death is overturned, the person shall be resentenced pursuant to this section by a jury that is specifically impaneled for this purpose as if the original sentencing had not occurred.

Lynch argues that subsection N's reference to the "original sentencing" means both the aggravation and penalty phases, thus requiring retrial of both of these phases of the sentencing proceeding any time a death sentence is overturned on appeal.

Lynch's approach is overly formalistic. As this Court observed, the error here arose not from anything occurring during the aggravation findings, but instead from the trial court's faulty instruction in the penalty phase. *Lynch*, 225 Ariz. at 42–43, ¶ 88, 234 P.3d at 610–11. Thus, this Court correctly cited to § 752(K) in remanding only for a new penalty phase without retrial of the aggravators because the penalty phase error below was akin to a penalty phase jury's inability to reach a unanimous verdict. In both circumstances, the sole flaw is in the penalty phase, not the entire sentencing proceeding. Furthermore, the death verdict Lynch appealed arose from a proceeding under § 13–752(K) after the original jury was unable to reach a sentencing verdict. *Id.* at 33, ¶¶ 12–13, 234 P.3d at 601. This Court's limited remand was therefore consistent with its mandate that the rules of criminal procedure "shall be construed to secure simplicity in procedure" and "the elimination of unnecessary delay and expense." Ariz. R. Crim. P. 1.2. Consequently, this Court properly ordered a limited remand for a new penalty phase only.

Even assuming for the sake of argument that, when applicable, § 13–752(N)'s reference to "the original sentencing" calls for retrial of both the aggravation and penalty phases, Lynch still was not entitled to a retrial of the aggravating factors. Under Arizona law, only if the jury finds at least one aggravator to exist beyond a reasonable doubt does the jury consider "whether

the death penalty should be imposed." A.R.S. § 13–752(D); *State v. Snelling*, 225 Ariz. 182, 190, ¶ 38, 236 P.3d 409, 417 (2010). In other words, a death sentence requires both the finding of at least one aggravating factor and a determination that death is the appropriate penalty. Here, because the error went not to the existence of aggravating factors, but only the penalty phase jury instructions, this Court did not need to, and did not vacate the entirety of the sentencing proceedings. Thus, the Court's order and remedy did not "overturn[]" all of the findings necessary for Lynch's death sentence, and § 13–752(N) was not implicated. Rather, the Court simply remanded for a new penalty phase, which was all that was necessary to correct the error which occurred. This remedy was also consistent with this Court's statutory authority to "reverse, affirm or modify the judgment appealed from, and may grant a new trial or *render any judgment or make any order* which is consistent with the justice and the rights of the state and the defendant." A.R.S. § 13–4036 (emphasis added).

Finally, Lynch's reliance on *State v. Armstrong*, 218 Ariz. 451, 189 P.3d 378 (2008), *State v. Pandeli*, 215 Ariz. 514, 161 P.3d 557 (2007), and *Nordstrom v. Cruikshank*, 213 Ariz. 434, 142 P.3d 1247 (App. 2006), is inapposite. All three cases were remanded for new sentencing hearings in light *Ring v. Arizona*, 536 U.S. 584 (2002), in which the Supreme Court held that the

Sixth Amendment required that a jury find *aggravating* circumstances that make a defendant eligible for the death penalty. Thus, unlike here, the error in those cases went to the finding of aggravating circumstances.

4. Lynch received an individualized sentencing.

Lynch additionally argues that, by remanding for a retrial on the penalty phase only and prohibiting the jury from retrying the aggravating factors, this Court deprived him of an individualized sentencing under the United States and Arizona constitutions. (O.B. at 89–91.) Specifically, he argues that the trial court's jury instructions that the *Enmund/Tison* factors and aggravating factors were already found placed a "thumb on death's side of the scale" and prevented the jurors from hearing evidence regarding the aggravating factors and assessing their weight. Lynch's argument is foreclosed by this Court's decision in *Prince II*.

"At the penalty phase, the jury must make 'a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime.'" *Prince II*, 226 Ariz. at 527, 250 P.3d at 1156 (quoting *Kansas v. Marsh*, 548 U.S. 163, 174 (2006)). In *Prince II*, this Court rejected an argument almost identical to the one Lynch makes here—that A.R.S. § 13–752(K) was unconstitutionally vague because it failed to establish procedures governing admission of evidence of the

aggravating factors found by a previous jury to a new jury during a second penalty phase. This Court held that penalty phase retrials under § 13–752(K) meet the constitutional requirement of an individualized sentencing because the broad and generalized standard of § 13–752(G), which governs admission of penalty phase evidence, permits the parties to introduce evidence regarding the circumstances of the crime and the aggravating circumstances already found. *Id.* at 525–28, ¶¶ 9–25, 250 P.3d at 1154–57. Consequently, "[n]othing about a trifurcated proceeding under § 13–752(K) deprives a defendant of a fair trial or reliable sentencing determination." *Id.* at 528, ¶ 25, 250 P.3d at 1157; *see also State v. Reeves*, 233 Ariz. 182, 186, ¶¶ 11–13, 310 P.3d 970, 974 (2013) (citing *Prince II* in rejecting argument that Arizona's death penalty statutes are unconstitutionally vague for failing to provide sufficient guidance on presentation, at retrial of penalty phase, of evidence of aggravating circumstances found by previous jury).[7]

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[7] This Court's conclusion in *Prince II* also rebuts Lynch's argument that the language of § 13–752(N) evidences the legislature's intent that a sentencing jury is always "empowered to hear evidence of *Enmund/Tison* factors, aggravating factors, and mitigating factors." (O.B. at 91.) The legislature accomplished this objective with §13–752(G)'s broad standard for evidence that may be admitted, even in a proceeding under § 13–752(K) where the only issue for the jury to determine is whether there is mitigation sufficiently substantial to call for leniency.

This Court's holdings in *Prince II* and *Reeves* foreclose Lynch's contention that he did not receive an individualized sentencing simply because the sentencing jury could not retry the aggravating factors making him eligible for a death sentence. Furthermore, his argument rests on the faulty premise that the new jury was "not given the full opportunity to evaluate the evidence supporting aggravating factors," was "not exposed to shortcomings regarding any aggravating factors which [were] found," and was not able to determine whether the aggravating factors were "of little weight in the scheme of evidence." (O.B. at 90.) To the contrary, the parties presented numerous witnesses whose testimony went to the circumstances of the offense and the aggravating factors, and much of both parties' closing arguments were devoted to discussing whether the evidence established that Lynch wielded the knife that slashed Panzarella's throat and other circumstances of the crime and aggravating circumstances.[8] *See Anderson*, 210 Ariz. at 348, ¶ 85, 111 P.3d at

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[8] This evidence consisted of testimony from Detective Hugh Lockerby (R.T. 7/24/12, at 20–77, R.T. 8/6/12, at 4–26; R.T. 8/7/12, at 59–66), Dr. Philip Keen (R.T. 7/24/12, at 77–104; R.T. 7/25/12, at 3–28), Arthur Panzarella (R.T. 7/25/12, at 29–30), Penny Dechant (R.T. 7/25/12, at 137–85; R.T. 7/26/12, at 75–91), Tracy Ramsay (R.T. 7/26/12, at 4–48), Officer Allen Hale (*id.* at 49–65), Michael Lawler (*id.* at 66–74), Detective Mark Walther (R.T. 8/6/12, at 27–44), Detective Kevin Furia (*id.* at 45–64), Officer Christopher Hall (*id.* at 70–88), Tracie Paolillo (*id.* at 89–92), Steven Garrett (*id.* at 96–151), Steven Clemens (*id.* at 151–77; R.T. 8/7/12, at 3–57), Kathryn Burton (R.T. 8/7/12,

(continued ...)

390 (holding that instruction to aggravation/penalty phase jury not to revisit issue of guilt in *Ring* resentencing did not deprive defendant of right to an individualized sentencing). Lynch does not argue that he was prevented from introducing any evidence (other than the guilt verdict form, which, as demonstrated below, was properly precluded) regarding the aggravating factors or the circumstances of the crime. *See id.* Moreover, nothing prevented Lynch from offering any evidence from the previous guilt or aggravation phases had he found it helpful to his mitigation case.[9] Lynch's resentencing was therefore constitutional because the jury was able to "render a reasoned, individualized sentencing determination based on [Lynch's] record, personal characteristics, and the circumstances of his crime." *Marsh*, 548 U.S. at 174.

B. THE TRIAL COURT PROPERLY PRECLUDED ADMISSION OF THE FIRST JURY'S GUILT-PHASE VERDICT.

Before retrial of the penalty phase, Lynch filed a notice of intent to introduce the first jury's guilty verdict on first-degree murder—which indicated

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(... continued)

at 67–70), Michael Case (*id.* at 71–76), Dennis Olson (*id.* at 76–124), Amy Blakely (R.T. 8/8/12, at 19–33), Vincent Marchase (*id.* at 34–39), Detective Paul Arnold (*id.* at 40–47), and portions of Sehwani's recorded interview (*id.* at 55–129). The parties spent considerable time on the circumstances of the crime in closing arguments. (R.T. 8/9/12, at 22–42 [defense], 48–62, 81–89 [prosecutor], 91–94 [defense].)

[9] For this same reason, Lynch is incorrect that he was prejudiced. Nothing prevented him from introducing any evidence regarding the circumstances of

(continued ...)

that while all of the jurors found that Lynch committed felony murder, only five found that he committed premeditated murder—as mitigation pursuant to *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982). (ROA, Items 647, 648.) The State objected, and the trial court denied Lynch's motion because the verdict form was irrelevant to any aspect of Lynch's character, propensities, or record, or the circumstances of the offense, and it was improper to permit the jury to speculate on the motives and mental processes of the prior jury. (ROA, Items 661, 684.)

Lynch argues that the trial court violated his rights under the United States and Arizona Constitutions by preventing him from introducing the first jury's guilt-phase verdict form as mitigation. (O.B. at 91–93.) The trial court did not abuse its discretion because the verdict form was not constitutionally relevant mitigation. *State v. Benson*, 232 Ariz. 452, 466, ¶ 58, 307 P.3d 19, 33 (2013) (reviewing admissibility of proffered mitigation for abuse of discretion).

The Eighth and Fourteenth Amendments require that the sentencer in a capital case must be permitted to consider as mitigation "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett*, 438

(... continued)
the offense or the aggravating factors that he believed was relevant to the sentence he should receive.

U.S. at 604. The circumstances of the offense may include "[t]he absence of direct proof that the defendant intended to cause the death of the victim" or "a defendant's comparatively minor role in the offense." *Id.* at 608. "This requirement, however, does not limit 'the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense.'" *State v. Chappell*, 225 Ariz. 229, 238, ¶ 29, 236 P.3d 1176, 1185 (2010) (quoting *Lockett*, 438 U.S at 604 n.12).

The trial court did not abuse its discretion because the verdict form was irrelevant to Lynch's background or the circumstances of the offense—the only information it provided was insight into the theory on which the previous jury convicted Lynch of first-degree murder. Lynch contends, however, that the verdict was relevant to the "nature of the conviction" and the absence of direct proof the defendant intended to cause the victim's death. First, the "nature of the conviction" is not the Eighth Amendment standard for relevant mitigation because it is unrelated to Lynch's character or record, or the circumstances of the crime. The guilt-phase verdict was relevant to Lynch's sentencing only in a legal sense—his conviction of first-degree murder, regardless of the theory, rendered him eligible for a death sentence so long as an aggravating factor was found. *See* A.R.S. §§ 13–751(A), –752(C), (D).

Second, the form was evidence of what the first jury *thought* about the evidence it heard, but it was not evidence that Lynch did not intend to cause Panzarella's death. Lynch does not argue that he was precluded from introducing any evidence that had been presented to the guilt-phase jury and, as noted above, the penalty phase retrial included much testimony about the circumstances of the murder.[10] *See Anderson*, 210 Ariz. at 348, ¶ 85, 111 P.3d at 390. Because the verdict form was irrelevant to Lynch's "character, prior record, or the circumstances of his offense," the trial court did not abuse its discretion by precluding it. *See Chappell*, 225 Ariz. at 238, ¶ 29, 236 P.3d at 1185.

III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED LYNCH'S "WAIVER" OF A RELEASE-ELIGIBLE SENTENCE AND DECLINED TO INSTRUCT THE JURY PURSUANT TO *SIMMONS V. SOUTH CAROLINA*.

Lynch argues that the trial court erred when it denied his "waiver" of a release-eligible life sentence and refused to instruct the jurors that if they gave him a life sentence, he would never be released from prison. (O.B. at 96–107.)

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[10] Again, this shows that Lynch was not prejudiced. He does not argue that he was prevented from introducing any evidence presented to the previous guilt- or aggravation-phase juries that would have helped him to rebut the prosecutor's argument—based on the evidence—that he sliced the victim's throat.

This Court has repeatedly held that such instructions are not required under Arizona law, and Lynch provides this Court with no reason to deviate from its consistent precedent.

Before trial, Lynch filed a waiver of his "statutory right to be considered for a release-eligible sentence" should the jury return a life verdict, and moved the court to instruct the jury regarding his ineligibility for release pursuant to *Simmons v. South Carolina*, 512 U.S. 154 (1994). (ROA, Item 650.) The trial court denied the waiver and the instruction, relying on this Court's rejection of the same argument in *State v. Dann*, 220 Ariz. 351, 207 P.3d 604 (2009). (ROA, Item 684, at 5–6.) The trial court instructed the jury that if it did not impose the death penalty, "the Court will sentence him to either life without the possibility of release until at least 25 calendar years in prison are served, or natural life, which means the defendant would never be released from prison." (R.T. 8/9/12, at 107.) This Court reviews the trial court's refusal to accept Lynch's "waiver" or parole ineligibility and to instruct the jury for an abuse of discretion. *See Benson*, 232 Ariz. at 465, ¶ 52, 307 P.3d at 32.

Lynch mistakenly argues that his requested instruction was required by *Simmons*, which held that "where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole

ineligible." 512 U.S. at 156. His argument fails because even if he were correct that his future dangerousness was at issue, the trial court was not required to accept his waiver of a release-eligible sentence and Arizona law does not prohibit his release on parole.

First, Arizona law "does not confer a 'right' to parole eligibility on defendants," but leaves that decision "squarely within the trial court's discretion." *Benson*, 232 Ariz. at 465, ¶ 54, 307 P.3d at 32. Consequently, the trial court did not abuse its discretion by rejecting Lynch's waiver of a parole-eligible sentence. *See id.* (citing *Dann*, 220 Ariz. at 372–73, ¶¶ 122–24, 207 P.3d at 625–26).

Second, the trial court did not err by refusing to instruct the jury pursuant to *Simmons*. "*Simmons* applies only to instances where, as a legal matter, there is no possibility of parole if the jury decides the appropriate sentence is life in prison." *Ramdass v. Angelone*, 530 U.S. 156, 169 (2000). In other words, *Simmons* does not apply when no state law prohibits the defendant's release on parole. *State v. Hardy*, 230 Ariz. 281, 293 ¶ 58, 283 P.3d 12, 24 (2012). The sentencing statute applicable to Lynch provided:

> If the court imposes a life sentence, the court may order that the defendant not be released on any basis for the remainder of the defendant's natural life. An order sentencing the defendant to natural life is not subject to commutation or parole, work furlough or work release. If the court does not sentence the defendant to natural life, the defendant shall not be released on any basis until

> the completion of the service of twenty-five calendar years if the victim was fifteen or more years of age and thirty-five years if the victim was under fifteen years of age.

A.R.S. § 13–703(A) (2001).

This Court has consistently held that this statutory language obviates the need for a *Simmons* instruction. *See, e.g., Benson*, 232 Ariz. at 465, ¶ 56, 307 P.3d at 32 (no error in denying *Simmons* instruction where same statutory language applied if defendant received a life sentence).[11] Because the applicable statute does not prohibit Lynch from ever being released on parole, the trial court did not err by instructing the jury that if it returned a life verdict, the court would sentence Lynch to either natural life or life with the possibility of release after 25 years. *Id.*

Despite this overwhelming authority, Lynch argues that unlike in other cases addressing this issue, he is ineligible for parole because the legislature abolished parole in 1994. First, he is incorrect that those other cases are distinguishable because, contrary to his assertion, the crimes in those cases

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[11] *See also State v. Boyston*, 231 Ariz. 539, 552–53, ¶ 68, 298 P.3d 887, 900–01 (2013) no *Simmons* instruction required because no state law prohibited defendant's release on parole); *Hardy*, 230 Ariz. at 293, ¶ 58, 283 P.3d at 24 (same); *State v. Hausner*, 230 Ariz. 60, 90, 280 P.3d 604, 634 (2012) (same); *Chappell*, 225 Ariz. at 240, ¶ 43, 236 P.3d at 1187 (same); *Hargrave*, 225 Ariz. at 14–15 ¶ 53, 234 P.3d at 582–83 (same); *State v. Garcia*, 224 Ariz. 1, 18, ¶

(continued ...)

occurred after 1994, putting those defendants in the same situation as Lynch with respect to parole eligibility. Second, Lynch misunderstands *Simmons*' meaning. There, the defendant was specifically *in*eligible for parole under state law because he had two prior felony convictions. *Simmons*, 512 U.S. at 156. Here, Lynch was not similarly legally ineligible for parole. Instead, he could have received a parole-eligible sentence, and though there may not be a currently existing parole mechanism, nothing prevents the legislature from creating a parole system in the future for which Lynch would have been eligible had the court sentenced him to life with the possibility of release after 25 years.

Lynch also argues that this Court's reliance on the possibility of other forms of release, such as executive clemency, is constitutionally insufficient under *Simmons*. But once again, unlike Lynch, the defendant in *Simmons* was *specifically ineligible* for parole, whether or not a parole system existed. 512 U.S. at 156. His attempt to distinguish his situation from this Court's prior cases addressing this very issue is unavailing.

Furthermore, because the jurors were instructed that Lynch would be required to serve a 21–year sentence for his other convictions after any

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76, 226 P.3d 370, 387 (2010) (same); *State v. Cruz*, 218 Ariz. 149, 160, ¶ 42, 181 P.3d 196, 207 (2008) (same).

sentence he received for the murder (R.T. 8/9/12, at 15–16), they knew that he would serve, at the very least, 46 years in prison. Defense counsel emphasized this in closing argument and argued that, in connection with his medical condition, "the likelihood that he'll ever be released is just unimaginable" and that Lynch would "die in prison one way or the other." (*Id.* at 45–46, 99–100.) "Thus, the jury received sufficient information from which it could conclude that [Lynch] would likely die in prison," and the trial court did not err in refusing the instruction. *See Garcia*, 224 Ariz. at 18, ¶ 78, 226 P.3d at 387

Finally, Lynch contends that the instructions misstated the law because they stated that, if he received a natural life sentence, Lynch would not be eligible for "parole, work furlough, work release, or release from confinement on any basis, and his sentence cannot be commuted." (R.T. 7/17/12, at 25.) This did not misstate the law. Contrary to Lynch's assertion, this language did not tell the jury that Lynch would be eligible for parole, it simply described various types of potential release that could never apply if he received natural life. Because the trial court's instructions accurately stated the law, no error occurred. *See Benson*, 232 Ariz. at 465, ¶ 57, 307 P.3d at 33.

IV

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT REJECTED LYNCH'S *BATSON* CHALLENGE TO THE STATE'S USE OF PEREMPTORY STRIKES.

Relying almost entirely on non-binding authority from federal courts and other states, Lynch argues that the trial court committed reversible error by failing to engage in the third step of the *Batson*[12] analysis, that is, determining whether Lynch demonstrated purposeful discrimination in the prosecution's peremptory strikes of potential Jurors 32 and 34. (O.B. at 108–20.) The trial court did not clearly err because the prosecutor offered race-neutral explanations for the strikes and Lynch offered no evidence to prove the prosecutor's explanation was a pretext for discrimination.

After the parties made their peremptory strikes, Lynch made a *Batson* challenge to the prosecutor's strikes of prospective jurors 8, 32, 34, 49, and 255, arguing that they all identified themselves as Hispanic and that, therefore, half of the prosecutor's ten strikes were used on "a minority." (R.T. 7/17/12, at 10.) When the court asked defense counsel how many other Hispanics were on the jury panel, he stated that he did not know, but argued that using 5 of 10 strikes on "a minority" established prima facie racial discrimination. (*Id.*) The court then asked the prosecutor to provide reasons for the strikes. (*Id.*) The prosecutor explained as follows:

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[12] *Batson v. Kentucky*, 476 U.S. 79 (1986).

- He struck Juror 255 because she was "philosophically opposed to the death penalty" and he did not want anyone that strongly opposed to the death penalty on the jury. (*Id.* at 10–11.)

- He struck Juror 49 because she had previously been on two juries that hung and he did "not want this case to hang." (*Id.* at 11–12.)

- He struck Juror 34 because that juror had numerous visible tattoos, more than anyone else on the jury panel, and one of Lynch's mitigating circumstances was that he contracted Hepatitis C from receiving a tattoo while in custody. (*Id.* at 12–13.)

- He struck Juror 32 because that juror had unkempt facial hair and a long ponytail and he would have struck "anybody with that type of grooming." (*Id.* at 13.) The prosecutor added that the previous day he asked the court to strike another prospective juror for cause, partly because that juror, who was white, had a similar appearance. (*Id.* at 14.)

- And he struck Juror 8 because some of Lynch's mitigation involved possible allegations of sexual abuse and sexual "innuendo" and that juror appeared to believe that the prosecution had taken "advantage of" her brother who had been convicted of child abuse. (*Id.* at 14–15.)

The Court found that the prosecutor's stated reasons were "race neutral" and concluded that it would "allow the strikes." (*Id.* at 15.) Defense counsel responded, "[j]ust for the record," that the prosecutor's reasons for striking Jurors 32 and 34 "did not cure or justify the strikes." (*Id.*)

Using a peremptory strike to exclude a potential juror based on race violates the Equal Protection Clause of the Fourteenth Amendment. *Batson*,

476 U.S. at 89. In addressing *Batson* challenges to the use of a peremptory strike, courts conduct a three-step analysis: "(1) the party challenging the strike[] must make a *prima facie* showing of discrimination; (2) the striking party must provide a race-neutral reason for the strike; and (3) if a race-neutral explanation is provided, the trial court must determine whether the challenger has carried its burden of proving purposeful racial discrimination." *State v. Canez*, 202 Ariz. 133, 146, ¶ 22, 42 P.3d 564, 577 (2002) (citing *Purkett v. Elem*, 514 U.S. 765, 767 (1995)).[13] At each stage of the analysis, "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *Garcia*, 224 Ariz. at 10, ¶ 21, 226 P.3d at 379 (quoting *Purkett*, 514 U.S. at 768). When considering a *Batson* challenge, appellate courts defer to the trial court's factual findings unless clearly erroneous and review *de novo* the trial court's application of the law. *State v. Lucas*, 199 Ariz. 366, 368, ¶ 6, 18 P.3d 160, 162 (App. 2001). The trial court's denial of a *Batson* challenge "will not be reversed unless clearly erroneous." *Newell*, 212 Ariz. at 400, ¶ 52, 132 P.3d at 844.

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[13] Where, as here, the trial court requests an explanation for the peremptory strike, the first step of the *Batson* analysis is complete. *See State v. Trostle*, 191 Ariz. 4, 12, 951 P.2d 869, 877 (1997).

As a preliminary matter, Lynch's argument that the trial court's failure to conduct the third step of the *Batson* analysis is per se error fails. In *Newell*, for example, the defendant raised a *Batson* challenge to the prosecutor's peremptory strike of the only remaining African-American on the venire panel. *Id.* at ¶ 51. When asked by the trial court for an explanation, the State replied that it struck the juror due to her contradictory responses about whether she could impose the death penalty. *Id.* at 401, ¶¶ 55–58, 132 P.3d at 845. This Court held that the prosecutor's reason satisfied *Batson's* second step because it was race-neutral. *Id.* at ¶ 58. Then, with no discussion of whether the trial court conducted *Batson's* third step, this Court concluded that the strike did not violate *Batson*, noting that the defendant offered no evidence, other than inference, that the strike resulted from purposeful discrimination. *Id.* (citing *Purkett*, 514 U.S. at 768) (opponent of the strike carries the ultimate burden of persuasion); *see also State v. Bailey*, 160 Ariz. 277, 281, 772 P.2d 1130, 1134 (1989) (trial court "properly accepted the prosecutor's racially-neutral explanation"; no mention whether trial court addressed *Batson's* third step).

Similarly, in *Canez*, after asking the State to explain its strikes, the trial court found that the State's explanations were race-neutral and denied the defendant's *Batson* challenge. 202 Ariz. at 145, ¶ 16, 42 P.3d at 576. This Court concluded that in denying the *Batson* challenge after finding the

prosecutor's reasons race-neutral, the trial court "implicitly" found that the defendant "had not carried his burden of proving purposeful discrimination in any of the state's peremptory strikes." *Id.* at 147, ¶ 28, 42 P.3d at 578.

Similarly, here, the trial court's denial of Lynch's *Batson* motion was not clear error because the State offered race neutral explanations, Lynch offered no evidence, other than inference, that purposeful racial discrimination motived the challenged strikes, and a finding that Lynch failed to meet his burden of proving purposeful discrimination was implicit in the trial court's ruling. First, the State provided race-neutral reasons for striking jurors 32 and 34. The prosecutor stated that he struck Juror 32 due to his unkempt facial hair and ponytail. (R.T. 7/17/12, at 13–14). This is a race-neutral reason and satisfies step two of the *Batson* analysis. *Purkett*, 514 U.S. at 769 (strike of African-American juror because he had "long, unkempt hair, a mustache, and a beard is race neutral and satisfies the prosecution's step two burden"). The prosecutor's reason for striking Juror 34—numerous visible tattoos—was also race-neutral because tattoos are not peculiar to any race. *See id.* ("The wearing of beards is not a characteristic that is peculiar to any race.") (citation omitted). In light of these explanations, the trial court did not clearly err in concluding that the prosecutor's reasons were race-neutral.

Next, the trial court did not clearly err in denying the *Batson* challenge to Jurors 32 and 34 because Lynch offered no evidence that the strikes were the result of purposeful discrimination. *See Garcia*, 224 Ariz. at 10, ¶ 21, 226 P.3d at 379. The only basis for Lynch's challenge was that the State used half of its peremptory strikes on potential jurors who had identified themselves as Hispanic. (R.T. 7/17/12, at 10.) Notably, defense counsel did not assert that the prosecution struck all Hispanic or minority members of the venire panel. *See Roque*, 213 Ariz. at 204, ¶ 15, 141 P.3d at 379 ("Although not dispositive, the fact that the state accepted other [minority] jurors on the venire is indicative of a nondiscriminatory motive.") (quotation omitted). Nor did defense counsel assert that the prosecutor failed to strike similarly situated, non-minority jurors. In fact, Lynch offered nothing to rebut the prosecutor's statements that no other juror had as many visible tattoos as Juror 34 and that he had asked the court to strike for cause a non-minority juror who had an appearance similar to Juror 32's. (*Id.* at 13–14.) Lynch's argument on appeal that the prosecutor failed to voir dire either the entire venire panel or these individual jurors on tattoos and grooming fails to make up for the lack of any evidence in the record, other than a weak inference based on the number of Hispanic jurors the State struck, of purposeful discrimination.

Under these circumstances, the trial court did not clearly err in denying the *Batson* challenge—even though it did not explicitly engage in *Batson's* third step—because Lynch "offered no evidence, other than inference, to show that the peremptory strike[s] [were] a result of purposeful racial discrimination." *Newell*, 212 Ariz. at 402, ¶ 58, 132 P.3d at 846. Furthermore, the conclusion that Lynch failed to carry his burden of proving purposeful discrimination was implicit in the trial court's statement that the State's reasons were race-neutral and that it would "allow the strikes." *See Canez*, 202 Ariz. at 147, ¶ 28, 42 P.3d at 578. Accordingly, the trial court's denial of Lynch's *Batson* challenge to Jurors 32 and 34 should be affirmed.

V

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DECLINED TO STRIKE FOR CAUSE A JUROR WHO PREVIOUSLY WORKED WITH, BUT HAD NO PERSONAL CONTACT WITH, ONE OF THE STATE'S EXPERT WITNESSES.

Lynch argues that the trial court's failure to excuse for cause Juror 5 after she informed the court that she had worked at the same hospital as one of the State's expert witnesses violated A.R.S. § 21–211 and deprived him of his right to an impartial jury. (O.B. at 121–38.) In light of the juror's lack of personal interaction with the witness and avowals that she could be fair and impartial, the trial court did not abuse its discretion.

A. FACTUAL BACKGROUND.

During its rebuttal case, the State called Dr. Vincent Honan in response to testimony from Dr. Gerald Altschuler. (R.T. 7/26/12, at 92.) While describing his credentials, Dr. Honan, a gastroenterologist, stated that he was "involved" with Banner Samaritan Hospital's liver transplant program. (*Id.* at 96.) After Dr. Honan left the witness stand, Juror 5 sent a note to the trial court, stating:

> Judge O'Connor, I should tell you that I worked for Banner Health from September 2008 to May 2010. I worked in the medical surgical ICU at Banner Good Sam. My floor was 11C/D, which was the medical surgical unit that was responsible for caring for patients pre and post liver transplant. Not sure whether that information is important for this case, but wanted to make sure that you know as full disclosure. Thank you. Juror No. 5.

(*Id.* at 144; ROA, Item 780.)

After reading the note to the parties, the court permitted them to voir dire Juror 5. (R.T. 7/26/12, at 144.) Asked by the prosecutor whether she could be fair and impartial, the juror said:

> Absolutely. I just wanted to make sure you knew that because Dr. Honan has taken care of patients on the 11th floor, which is A, B, C and D. I worked in C and D.
>
> However, my experience was caring for patients from another gastroenterology practice, however, I have seen Dr. Honan. I didn't recognize his name on that list, but I did recognize him when he came in. But it's a teaching facility, so the docs that are really caring for the patients pre and post transplant are the surgical residents. He oversees the surgical residents. But I wanted to make sure you knew that.

(*Id.* at 145.)

Defense counsel then asked Juror 5 if she had an opinion about "what kind of doctor he was." (*Id.*) The juror responded: "I mean, I knew he was a gastroenterologist. But my dealings were really with the surgical residents. I know of him, but I just wanted to make sure that you were aware of that." (*Id.* at 145–46.) When defense counsel followed up on this answer by asking whether what Juror 5 knew of Dr. Honan was "very favorable," she said, "Yes, I mean, I think the surgeons that work at Good Sam are excellent surgeons." (*Id.* at 146.) The court then confirmed with Juror 5 that she had no direct interaction with Dr. Honan. (*Id.*) Defense counsel asked if Juror 5 was nonetheless aware of Dr. Honan's reputation "in the hospital community," and she answered:

> I mean, you're aware of a lot of the doctors that work in the hospital. But, like I said, my dealings were really the surgical residents.
>
> As far as trusting the surgical residents, if they have to consult with someone, they would consult with their supervising physician, which could be Dr. Honan or other surgeons. I just—I don't think it's—for me, it doesn't mean anything, but I wanted to make sure that you knew.

(*Id.* at 146–47.) In response to defense counsel's final question, asking whether she thought it was important for the court and parties to know that she had knowledge of Dr. Honan as a gastroenterologist, Juror 5 stated:

> Yes. I don't know him personally. I just recognized him. I saw him in the unit. But most of the patients that I cared for were from another gastroenterology group. I may have cared for a patient as Dr. Honan being the attending surgeon once or twice, but most of the time it was with another surgical group.

(*Id.* at 147.)

Lynch's counsel moved to strike Juror 5 from the jury. (*Id.*) The trial court denied the motion, finding no legal basis to excuse the juror for cause. (R.T. 8/8/12, at 3–4.) Lynch re-raised the issue in his motion for new trial, and the trial court once again denied it. (ROA, Items 790, 797.)

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION.

Cause to excuse a juror exists "when there is reasonable ground to believe that a juror cannot render a fair and impartial verdict." Ariz. R. Crim. P. 18.4(b). The challenging party bears the burden of establishing that the juror cannot be fair and impartial. *State v. Hoskins*, 199 Ariz. 127, 139, 14 P.3d 997, 1009 (2000). To meet this burden, a defendant "must show that the potential juror is unable to lay aside preconceived notions and render a fair and impartial verdict based on the evidence presented at trial." *Comer*, 165 Ariz. at 426, 799 P.2d at 346 (1990). A juror's knowledge of a witness does not require disqualification; rather, "[i]n deciding whether a juror may continue to sit in this situation, the court must consider the relationship between the witness and the juror, whether the juror will properly assess the testimony, the importance

of the testimony, and whether the testimony is disputed." *Bible*, 175 Ariz. at 574, 858 P.2d at 1177.

This Court will set aside the trial court's decision not to excuse a juror for cause only when that decision was a clear abuse of discretion. *State v. Medina*, 193 Ariz. 504, 511, ¶ 18, 975 P.2d 94, 101 (1999). This is because "[i]n assessing a potential juror's fairness and impartiality, the trial court has the best opportunity to observe prospective jurors and thereby judge the credibility of each." *Hoskins*, 199 Ariz. at 139, 14 P.3d at 1009.

Here, the trial court did not abuse its discretion in denying Lynch's motion to strike Juror 5 for cause in light of her minimal knowledge of Dr. Honan and avowals that she could be fair and impartial. Although Dr. Honan's testimony was significant and went to a contested issue—he disputed Dr. Altschuler's testimony regarding Lynch's life expectancy and quality-of-life given his Hepatitis C—Juror 5's "relationship" with Dr. Honan did not rise even to the level of an acquaintanceship. Juror 5 stated that she had seen Dr. Honan in her unit at the hospital but had had no direct interaction with him and did not know him personally. (R.T. 7/26/12, at 145–47.) Thus, unlike in *Bible*, where the jury's foreman and a witness had been friends and the trial court still did not abuse its discretion in keeping the juror, Juror 5 had only an awareness of Dr. Honan, not any kind of personal relationship. *See* 175 Ariz. at 574–75,

858 P.2d at 1177–78. Furthermore, Juror 5 avowed that her knowledge of Dr. Honan would not impede her ability to be fair and impartial. (*Id.* at 145.) Under these circumstances, the trial court, who was in the best position to assess Juror 5's fairness and partiality, did not abuse its discretion in failing to strike her for cause. *See Hoskins*, 199 Ariz. at 139, 14 P.3d at 1009; *see also Bible*, 175 Ariz. at 574–75, 858 P.2d at 1177–78 (no abuse of discretion in failing to strike juror who had prior friendship with witness where they had not discussed case, had not seen each other for several years, and witness's testimony was unrebutted and not at core of State's case).

Lynch nonetheless argues that A.R.S. § 21–211(2) required the trial court to strike Juror 5. Because he did not raise this argument below, review is limited to fundamental error. *See Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607. Section 21–211(2) and (4) disqualify as a juror any person "interested directly or indirectly in the matter under investigation" or "biased or prejudiced in favor of or against either of the parties." Neither condition applied to Juror 5.

Relying on *State v. Eddington*, 228 Ariz. 361, 266 P.3d 1057 (2011), Lynch argues that Juror 5 had an "interest" in the case because "another person associated with her prior employer was a disputed witness in the case." (O.B. at 129.) In *Eddington*, this Court held that a sheriff's deputy employed by the

investigating law enforcement agency had an "interest" under § 21–211 and could not serve as a juror. 228 Ariz. at 365, ¶ 18, 266 P.3d at 1061. The situation here is nothing like *Eddington*. The hospital was not an investigating law enforcement agency—in fact, the hospital had no connection to the case other than the fact that an expert witness had treated patients there—and Juror 5 no longer worked there. Furthermore, Juror 5 and Dr. Honan were no longer coworkers and, unlike the peace officer in *Eddington*, there is no indication that Juror 5 had access to information about the case unavailable to other jurors. Although Lynch argues that "it is usually not in a person's best interest to disparage prior employers," the hospital, not Dr. Honan, was Juror 5's prior employer and she did not have to "disparage" him to find Dr. Altschuler more credible. Under these circumstances, Lynch has not established that Juror 5 was an "interested person" under § 21–211.

Nor does the record establish that Juror 5 had a bias or prejudice. Lynch hinges his argument on Juror 5's statement that she believed "the surgeons that work at Good Sam are excellent surgeons." (R.T. 7/26/12, at 146.) But this generalized comment must be viewed in its entire context, which also includes the juror's statements that she had no interaction with Dr. Honan, did not personally know him, and "absolutely" could be fair and impartial. In light of the totality of Juror 5's comments, and the trial court's ability to observe the

juror and assess her credibility, there was no abuse of discretion in failing to excuse her as biased and prejudiced. *See Hoskins*, 199 Ariz. at 139, 14 P.3d at 1009.

Lynch next argues that Juror 5 possessed knowledge outside the record since she knew that Banner Samaritan was a "teaching hospital," Dr. Honan supervised surgical residents, and the doctors who worked at the hospital were "excellent surgeons." (O.B at 132–36.) Insofar as this can even be construed as knowledge of matters outside the record, Lynch has not established that Juror 5 was unable to "render a fair and impartial verdict based on the evidence presented at trial." *See Comer*, 165 Ariz. at 426, 799 P.2d at 346. Juror 5's "knowledge" had nothing to do with the substance of either Dr. Honan's or Dr. Altschuler's testimony. Although Lynch contends it gave Juror 5 additional perspective on Dr. Honan's credibility, the information she stated added little, if anything, to Dr. Honan's testimony regarding his own credentials, including that he had been on the faculty at the University of Arizona and treated liver transplant patients at Banner Samaritan hospital. (R.T. 7/26/12, at 94–97.) Moreover, the trial court instructed the jurors that they must "determine the facts of this *only* from the evidence that is *presented in this courtroom*," regardless of "knowledge and information from the experiences you have had prior to this trial" (R.T. 7/17/12, at 45; emphasis added), and that the only

evidence they were to consider consisted of "the testimony of witnesses and exhibits this Court has *admitted in evidence during this hearing*." (R.T. 8/9/12, at 7. Emphasis added.) *See Newell*, 212 Ariz. at 403, ¶ 68, 132 P.3d at 847 (jurors are presumed to follow their instructions).

Lynch argues, however, that the trial court's instructions on expert witnesses and witness credibility specifically invited Juror 5 to apply her outside knowledge to Dr. Honan's credibility. (O.B. at 133–36.) Despite this contention, nothing in the substance of these instructions indicated that the jurors could use any information from outside the courtroom to assess witness credibility. Rather, the trial court's instructions were clear that the only information the jurors could use to arrive at their decisions came from testimony and exhibits presented at trial.

Lynch's final argument is that Juror 5's participation undermines public confidence in the proceedings. (O.B. at 137.) In *Eddington*, this Court observed that "[a] primary purpose of § 21–211 is to promote public confidence in the judicial system." 228 Ariz. at 364, ¶ 14, 266 P.3d at 1060. But as discussed above, § 21–211 did not prohibit Juror 5's participation as a juror. Moreover, the trial court did not abuse its discretion in failing to excuse Juror 5 because, on this record, Lynch cannot meet his burden of proving that

the juror could not be fair and impartial. *See Hoskins*, 199 Ariz. at 139, 14 P.3d at 1009. The trial court's decision on this matter should be affirmed.

VI

THE MITIGATION WAS NOT SUFFICIENTLY SUBSTANTIAL TO CALL FOR LENIENCY.

Because the murder occurred before August 1, 2002, this Court independently reviews the aggravation and mitigation findings, as well as the propriety of the death sentence. *See* A.R.S. §13–755(A). In conducting this independent review, the Court does not "merely consider the quantity of aggravating and mitigating factors that were proven," but looks "to the quality and strength of those factors." *Newell*, 212 Ariz. at 405, ¶ 82, 132 P.3d at 849. Finally, this Court does "not defer to the findings or decisions of the jury, with respect to aggravation or mitigation, when determining the propriety of the death sentence." *State v. Wallace*, 229 Ariz. 155, 158, ¶ 8, 272 P.3d 1046, 1049 (2012) (quoting *Newell*, 212 Ariz. at 405, ¶ 82, 132 P.3d at 849).

Lynch argues that the mitigation in the record is sufficiently substantial to call for leniency and that this Court should impose a life sentence. For the following reasons, however, this Court should affirm Lynch's death sentence.

A. AGGRAVATING CIRCUMSTANCES.

The previous juries found the existence of the pecuniary gain, A.R.S. § 13–751(F)(5), and especially heinous, cruel, or depraved, A.R.S. § 13–751(F)(6), aggravating circumstances. *Lynch*, 225 Ariz. at 33, ¶¶ 12–13, 234 P.3d at 601. Additionally, this Court previously concluded that both aggravators were established beyond a reasonable doubt. *Id.* at 40, ¶¶ 69–73, 41, ¶¶ 77–81, 234 P.3d at 608, 609.

To summarize, pecuniary gain was established by evidence that Panzarella's gun was found in a motel room Lynch used; Panzarella's debit and credit cards were used after the murder, including to pay for charges connected to a motel room Lynch rented; property belonging to Panzarella was found in a truck Lynch was entering when arrested; and Lynch and Sehwani returned to Panzarella's home intending to steal further from Panzarella and that he was murdered to avoid detection of the initial theft of his American Express card and the subsequent robbery and burglary. *Id.* at 40, ¶¶ 71–72, 234 P.3d at 608. That the murder was especially cruel was established by evidence that Panzarella would have felt physical pain as his throat was cut that would have lasted for at least a minute until he lost consciousness, and that he experienced mental anguish because he was almost surely conscious when bound to the

chair, ligatures, abrasions, and bruising on his body showed that he struggled, and he had time to contemplate his fate. *Id.* at 41, ¶¶ 78–79, 234 P.3d at 609.[14]

B. MITIGATING CIRCUMSTANCES.

At trial, Lynch asserted, and the trial court instructed the jury on, 13 mitigating factors:

> 1. The evidence is inconclusive as to whether it was Michael Sehwani or Shawn Lynch who used the knife to kill Mr. Panzarella.
>
> 2. The co-defendant, Michael Sehwani, received a life sentence in this case.
>
> 3. Shawn Lynch suffers from chronic Hepatitis C with cirrhosis of his liver, and as a result he has a significantly diminished life expectancy.
>
> 4. Shawn Lynch's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired, but not so impaired as to constitute a defense to prosecution.
>
> Significantly impaired means that a defendant suffered from substance abuse and/or alcohol abuse at or near the time of the offense, that prevented him from appreciating the wrongfulness of the conduct or conforming his conduct to the requirements of the law.
>
> 5. Shawn Lynch was raised in an unstable family filled with domestic violence.

---

[14] Although the juries also found that the murder was especially heinous and depraved, this Court did not consider whether the evidence also supported those findings since the cruelty finding alone was enough to establish the (F)(6) aggravating factor. *Lynch*, 225 Ariz. at 41, ¶ 81, 234 P.3d at 609.

6. As a child, Shawn Lynch suffered physical and emotional abuse from his father.

7. To punish Shawn Lynch for playing with matches, Shawn's father put Shawn's hands on a hot stove causing Shawn to be injured.

8. Shawn Lynch's mother and father periodically neglected him throughout his childhood.

9. Shawn Lynch was raised in a family where both parents suffered from alcoholism.

10. Shawn Lynch's younger brother committed suicide by a drug overdose.

11. Shawn Lynch suffered from drug abuse.

12. Shawn Lynch would not pose a danger to corrections employees/officers or other inmates if he receives a life sentence.

13. Shawn Lynch has been sentenced to a term of 21 years in the Arizona Department of Corrections for the convictions of kidnapping, armed robbery and burglary in the first degree. And these sentences have been ordered to run consecutively to whatever sentence he receives for the conviction of murder in the first degree.

(R.T. 8/9/12, at 14–16.) The trial court also instructed the jurors that they were not limited to these proposed mitigating circumstances, but could consider anything else in the record related to Lynch's character, propensity, history or record, or circumstances of the offense. (*Id.* at 16.) Neither Lynch's proposed mitigating factors, nor anything else in the record, was sufficiently substantial to call for leniency. *See* A.R.S. § 13–752(G).

1. ***Minor participation; evidence regarding who wielded the knife.***

Contrary to Lynch's contention that the evidence was inconclusive whether he or Sehwani cut Panzarella's throat, the evidence established that Lynch was the killer. As this Court previously noted, a state expert testified that the person who slit Panzarella's throat was standing behind the chair to which he was bound and that blood on Lynch's shoes was consistent with him standing in that position. *Lynch*, 225 Ariz. at 37, ¶ 49, 234 P.3d at 605. Another expert testified that Lynch's shoes were consistent with footwear impressions in the guesthouse. *Id.* at 37 n.6, 234 P.3d at 605 n.6. The State presented this evidence again at the penalty phase retrial. (*See* R.T. 8/6/12, at 107– 33; R.T. 8/7/12, at 84–107.)

In light of this evidence, Lynch failed to establish this mitigating circumstance by a preponderance of the evidence. *See* A.R.S. § 13–751(C). Even so, this Court previously found that the evidence established that Lynch was a major participant in the predicate felonies and acted with reckless indifference toward Panzarella's life to support the *Tison* findings. *Lynch*, 225 Ariz.at 37, ¶¶ 47–48, 234 P.3d at 605. Thus, Lynch failed to establish minor participation in the crime as a mitigating circumstance. *See Hoskins*, 199 Ariz. at 150, 14 P.3d at 1020 (although relatively minor participation in the crime can

be mitigating, this circumstance does not exist where the defendant was a major participant).

2. ***Sehwani's life sentence.***

"A disparity in sentences between codefendants and/or accomplices can be a mitigating circumstance if no reasonable explanation exists for the disparity." *Garcia*, 224 Ariz. at 21, ¶ 98, 226 P.3d at 390 (quotation omitted). Here, the disparity is explained because Sehwani confessed his participation in the crime to police and the evidence established that Lynch was the actual killer and the dominant party in the crimes.[15] *See State v. Medina*, 232 Ariz. 391, 413, ¶ 110, 306 P.3d 48, 70 (2013) (disparity not significantly mitigating where defendant was mainly responsible for the murder); *Canez*, 202 Ariz. at 165, ¶ 124, 42 P.3d at 596 (disparity not especially mitigating where, among other factors, accomplice cooperated with law enforcement).

Furthermore, "such disparities have little significance" where, as here, "the murder is especially cruel, heinous, or depraved." *Medina*, 232 Ariz.

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[15] As previously discussed, the blood and DNA evidence established that Lynch cut Panzarella's throat. Additionally, testimony from Tracy Ramsay, evidence that Sehwani purchased food and clothing for Lynch, and Sehwani's interview established that Lynch was the dominant actor of the two. (R.T. 7/24/12, at 23–32; R.T. 7/26/12, at 16, 19–20, 40; R.T. 8/7/12, at 59; R.T. 8/8/12, at 21–30, 43–44, 78–80, 82–83, 99, 102–03, 107–21, 125, 127–29; Exhibits 557, 558, 559, 560, 561.)

at 413, ¶ 110, 306 P.3d at 70 (citing *Ellison*, 213 Ariz. at 140, ¶ 105, 140 P.3d at 923). Accordingly, because the disparity is explained and the murder was especially cruel, heinous, or depraved, the fact that Sehwani received a life sentence is not significantly mitigating.

3. ***Lynch's medical condition.***

As detailed in his Opening Brief, Lynch presented testimony from Dr. Altschuler that he suffers from Hepatitis C and related effects, including cellulitis, encephalopathy, and pancytopenia, giving him a poor future prognosis. (O.B. at 144–47.) Based on this testimony, along with Lynch's other sentences, defense counsel argued that Lynch would die in prison. (R.T. 8/9/12, at 45–46, 99–100.) This Court has held that a defendant's "poor post-murder physical health" is not a mitigating circumstance because it does not address his character, propensities or record at the time of the murder. *State v. Kayer*, 194 Ariz. 423, 440, ¶ 61, 984 P.2d 31, 48 (1999); *State v. Spencer*, 176 Ariz. 36, 45, 859 P.2d 146, 155 (1993); *but see State v. Patton*, 120 Ariz. 386, 389, 586 P.2d 635, 638 (1978) (defendant's "physical health" was a "valid consideration" in determining sentence).

In any event, Lynch's poor post-offense health should be granted minimal mitigating weight. Although mitigating evidence must be considered absent a connection to the murder, the failure to establish such a connection

may be considered "in assessing the quality and strength of the mitigation evidence." *Newell*, 212 Ariz. at 405, ¶ 82, 132 P.3d at 849 (citing *Tennard v. Dretke*, 542 U.S. 274, 287 (2004), and *Anderson*, 210 Ariz. 327, 350, ¶¶ 96–97, 111 P.3d 369, 392 (2005)). Lynch's health condition thus merits little mitigating weight because it is completely unrelated to the offense—he only developed Hepatitis C after the killing.[16]

Additionally, Dr. Altschuler's testimony that Lynch was not likely to live much longer was largely rebutted by Dr. Honan. For example, Dr. Honan testified that: (1) the Child-Pugh Scale that Dr. Altschuler used to estimate Lynch's poor future prognosis was a "subjective" measure and that for a more accurate view of the long-term survivability of a person with liver disease, there were additional factors to consider, which Dr. Altschuler did not do (R.T. 7/26/12, at 97–105), (2) Lynch had two indicators that indicated a positive prognosis (*id.* at 120–21), and (3) Lynch's medical records suggested that although he had liver disease, Dr. Honan "wouldn't put him in a class where he is expected to die shortly" and estimated that Lynch had "statistically about an 80 percent survival of five years" (*id.* at 105–09). Consequently, Lynch's

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[16] In fact, the defense suggested that Lynch obtained the disease from receiving a tattoo while incarcerated after the crime. (R.T. 7/23/12, at 67–68.) Nor did

(continued ...)

argument that his disease would likely kill him sooner than later is entitled to little, if any, mitigating weight.

4. *(G)(1) factor and substance abuse.*

Lynch contended that his substance and/or alcohol abuse prevented him from appreciating the wrongfulness of his conduct or conforming his conduct to the requirement of the law. (R.T. 8/9/12, at 14–15.) To establish the A.R.S. § 13–751(G)(1) mitigating factor, the defendant must prove by a preponderance of the evidence that the "defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution." *Medina*, 232 Ariz. at 412, ¶ 100, 306 P.3d at 69 (quoting A.R.S. § 13–751(G)(1)).

Lynch presented evidence that he suffered from drug and alcohol abuse and that he used drugs around the time of the offense, mostly through the testimony of Dr. Brams. (R.T. 7/18/12, at 140–41, 153, 165, 166–68, 170–72.) However, he presented no specific evidence that, at the time of the murder, his drug or alcohol abuse prevented him from appreciating the wrongfulness of his conduct or conforming his conduct to the requirements of the law. *See State v.*

(... continued)

Lynch present any evidence of Hepatitis C or related health complications occurring before his incarceration.

Murdaugh, 209 Ariz. 19, 34, ¶ 74, 97 P.3d 844, 859 (2004) (drug use or intoxication alone are insufficient to establish (G)(1) factor; defendant must show some relationship between drug use and the offense); *Sansing*, 206 Ariz. at 239–40, ¶¶ 28–29, 77 P.3d at 37–38) (defendant failed to prove this mitigating circumstance where presented "only minimal testimony about his drug use on the day of the murder").

Furthermore, Lynch's "deliberate actions refute his impairment claim and establish that drug use did not overwhelm [his] ability to control his conduct." *Id.* at 240, ¶ 30, 77 P.3d at 38. As discussed above, the evidence showed that Lynch and Sehwani came with Panzarella to his home, used his funds to purchase the services of the dancer, left to make purchases, returned to steal more of Panzarella's property before tying him to a chair and slitting his throat, then left, taking the murder weapon with them, and continued to use Panzarella's funds to make purchases, with Lynch acting as the dominant party. These deliberate actions refute any claim that Lynch could not control his conduct. Consequently, Lynch failed to establish the (G)(1) mitigating circumstance.

Similarly, even as non-statutory mitigation, Lynch's drug and alcohol abuse is entitled to minimal mitigating weight because he "failed to tie his drug abuse to the crime or to his mental functioning" when he committed the

murder. *Garcia*, 224 Ariz. at 22, ¶ 104, 226 P.3d at 391 (quoting *Pandeli*, 215 Ariz. at 532, ¶ 75, 161 P.3d at 575). Moreover, he presented no evidence "that his brain chemistry was actually altered by his past alcohol abuse so as to cause or contribute to his participation in the murders." *Ellison*, 213 Ariz. at 145, ¶ 139, 140 P.3d at 928.

5. Dysfunctional childhood.

Through the testimony of his sister Kim Kloese, his uncle James Lynch, and Dr. Brams, Lynch presented evidence that he was raised in an unstable family that was marked by domestic violence, his father physically and emotionally abused him, his parents neglected him, and his parents were alcoholics. (R.T. 7/18/12, at 6–27, 56–73, 80–81, 122–75.) A difficulty family background can be a mitigating circumstance, but is due little weight "absent a showing that it affected the defendant's conduct in committing the crime." *Garcia*, 224 Ariz. at 22, ¶ 107, 226 P.3d at 391 (quoting *State v. Moore*, 222 Ariz. 1, 213 P.3d 150 (2009)). Lynch's dysfunctional childhood is entitled to minimal mitigating weight not only because he presented nothing showing that it affected his conduct during the murder, but also because he was nearly 40 years old when he murdered Panzarella. (R.T. 7/18/12, at 8.) *See Prince II*, 226 Ariz. at 542, ¶ 111, 250 P.3d at 1171 ("Prince was twenty-six years old when he killed Cassandra, attenuating the impact of his dysfunctional

childhood on his conduct."); *Ellison*, 213 Ariz. at 144, ¶ 136, 140 P.3d at 927 ("His childhood troubles deserve little value as a mitigator for the murders he committed at age thirty-three."); *State v. Hampton*, 213 Ariz. 167, ¶ 89, 140 P.3d 950 (2006) ("Further, Hampton was thirty years old when he committed his crimes, lessening the relevance to his difficult childhood.").

6. ***Brother's death.***

Lynch also asserted as a mitigating circumstance that his brother died from a drug overdose. This alleged factor should be afforded minimal, if any, mitigating weight because, occurring after the murder (R.T. 7/18/12, at 19–20), it cannot have had any impact on Lynch's commission of the crime. *See Newell*, 212 Ariz. at 405, ¶ 82, 132 P.3d at 849.

7. ***Lack of future dangerousness and other consecutive sentences.***

Through the testimony of James Aiken, Lynch presented evidence that he would not be a danger to others if he received a life sentence. (R.T. 7/23/12, at 11–26.) He also alleged as a mitigating circumstance that he was required to serve a 21–year sentence for his other crimes after any sentence imposed for the murder. These factors are entitled to only minimal weight. *See State v. Lehr*, 227 Ariz. 140, 155, ¶ 78, 254 P.3d 379, 394 (2011) (according minimal weight to prospect that defendant would be a "model prisoner" and that he would remained in prison for his natural life if he did not receive a death

sentence); *Garcia*, 224 Ariz. at 22, ¶ 108, 226 P.3d at 391 ("A defendant's reliance on the mere fact that he will be incarcerated provides no more than "minimal weight" for mitigation purposes.").

C. LYNCH'S DEATH SENTENCE WAS APPROPRIATE.

The aggravating factors in this case were strong. The evidence establishing the (F)(6) aggravating circumstance showed that Panzarella suffered physical pain from the moment his throat was cut for at least a minute until he lost consciousness. (R.T. 7/24/12, at 86–87, 89–91, R.T. 7/25/12, at 4, 8–9, 27–28.) *Lynch*, 225 Ariz. at 41, ¶ 78, 234 P.3d at 609. The evidence also established his mental anguish as he struggled while he was bound to the chair and had his throat slit. (R.T. 7/24/12, at 79–80, 91–93.) *Id.* at 41, ¶ 79, 234 P.3d at 609. This aggravating factor thus carries significant weight.

The pecuniary gain factor was also strong. Lynch and Sehwani returned to Panzarella's home to steal more property from him and eventually killed him to eliminate the witness to their crimes. (R.T. 7/24/12, at 23–32; R.T. 8/6/12, at 46–52, 73–74, 77–79; R.T. 8/7/12, at 67–69, 71–74.) *Lynch*, 225 Ariz. at 40, ¶¶ 71–72, 234 P.3d at 608. This factor, too, carries significant weight. *See State v. McKinney*, 185 Ariz. 567, 584, 917 P.2d 1214, 1231 (1996) (concluding that sole aggravating circumstance of pecuniary gain carried "great weight" and affirming death sentence).

In contrast, Lynch's mitigation evidence is not sufficiently substantial to call for leniency. In light of the strong aggravating factors and minimal weight due any of Lynch's mitigation, especially since he was unable to connect any of his proffered mitigation to the murder, this Court should affirm Lynch's death sentence on independent review. *See Newell*, 212 Ariz. at 406, ¶ 87, 132 P.3d at 850 (mitigation failed to rise to level calling for leniency where aggravating circumstances were compelling and no evidence explained how proffered mitigation led to the murder).

VII

THIS COURT HAS PREVIOUSLY REJECTED LYNCH'S SUMMARY CONSTITUTIONAL CHALLENGES TO ARIZONA'S DEATH PENALTY AND HE FAILS TO SUPPORT THE CHALLENGES WITH CONTRARY ARGUMENT OR AUTHORITY.

Lynch concedes that this Court has previously rejected his 26 summary challenges to the constitutionality of Arizona's death penalty and the death penalty in general. (O.B. at 149–58.) In view of his concessions and his failure to offer any argument or authority in support of these challenges, this Court need not consider them. *See, e.g., Benson*, 232 Ariz. at 35, ¶ 75, 307 P.3d at 468.

VIII

LYNCH'S CHALLENGE TO ARIZONA'S IMPLEMENTATION OF THE DEATH PENALTY AS CRUEL AND UNUSUAL IS PREMATURE.

This Court granted Lynch's motion to supplement his opening brief with a claim that Arizona's death penalty as currently implemented is cruel and unusual. (Order, filed 8/26/14; Motion to Supplement the Opening Brief, filed 7/31/14.) As a preliminary matter, the only facts Lynch provides to his argument come from media accounts that are not part of the record on appeal in this case. (Motion to Supplement the Opening Brief, at 2–3, Appendices A–F.) Consequently, this Court should not consider these materials. *See Schackart*, 190 Ariz. at 247, 947 P.2d at 324; *Martin*, 22 Ariz. at 328, 197 P. at 579. In any case, this claim is premature, and should be rejected by this Court. *See State v. Kiles*, 222 Ariz. 25, 42 n.20, ¶ 92, 213 P.3d 174, 191 n.20 (2009) (rejecting as "premature" an argument "that lethal injection as employed by the State is cruel and unusual" because defendant "may raise in a petition filed pursuant to Arizona Rule of Criminal Procedure 32 any objections to the protocol to be used") (quoting *Andriano*, 215 Ariz. at 510 n.9, ¶ 62, 161 P.3d at 533 n.9).

CONCLUSION

Based on the foregoing authorities and arguments, Appellee respectfully requests that this Court affirm the judgment and sentence of the trial court.

Respectfully submitted,

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APPENDIX – D –

IN THE SUPREME COURT
STATE OF ARIZONA

STATE OF ARIZONA, Appellee, v. SHAWN PATRICK LYNCH, Appellant.	No. CR-12-0359-AP Maricopa County Superior Court No. CR2001-092032 A

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 2

ARGUMENT 1 3

THE SENTENCE IN THIS CASE WAS TAINTED BY SEVERAL INSTANCES OF PROSECUTORIAL MISCONDUCT.

ARGUMENT 2 38

THE TRIAL COURT IMPROPERLY LIMITED THE SENTENCING PHASE WHEN THE TRIAL COURT DENIED LYNCH'S MOTION FOR RETRIAL OF AGGRAVATING CIRCUMSTANCES AND NOTICE OF MITIGATION EVIDENCE.

ARGUMENT 3 43

THE TRIAL COURT VIOLATED LYNCH'S RIGHTS WHEN THE COURT IMPROPERLY REFUSED TO INSTRUCT THE JURY ACCORDING TO *SIMMONS V. SOUTH CAROLINA*.

ARGUMENT 4 53

LYNCH WAS DEPRIVED OF HIS RIGHT TO A PROPERLY CONSTITUTED JURY WHEN THE TRIAL COURT FAILED TO ACCURATELY FOLLOW THE PROCEDURE SET FORTH IN *BATSON V. KENTUCKY*. AS A RESULT OF THE TRIAL COURT'S FAILURE, THE STATE WAS PERMITTED TO STRIKE TWO JURORS WITHOUT PROVIDING SATISFACTORY RACE-NEUTRAL REASONS FOR THE STRIKES.

TABLE OF CONTENTS (Continued)

Page

ARGUMENT 5 60

THE TRIAL COURT INCORRECTLY DENIED LYNCH'S MOTION TO STRIKE JUROR 5 WHEN JUROR 5 POSSESSED PERSONAL KNOWLEDGE FROM OUTSIDE THE RECORD REGARDING THE EXPERIENCE AND REPUTATION OF AN EXPERT WITNESS.

ARGUMENT 6 68

MITIGATION IS SUFFICIENTLY SUBSTANTIAL TO CALL FOR LENIENCY.

ARGUMENT 7 72

ARIZONA DEATH PENALTY IS UNCONSTITUTIONAL.

ARGUMENT 8 73

ARIZONA DEATH PENALTY IS UNCONSTITUTIONAL BECAUSE THE EXECUTION INVOLVES TORTURE AND A LINGERING DEATH.

CONCLUSION 76

TABLE OF CITATIONS

Page

UNITED STATES SUPREME COURT CASES

Ball v. United States, 470 U.S. 856 (1985) 30
Batson v. Kentucky, 476 U.S. 79 (1986) 53, 54, 55, 57, 58, 59
Enmund v. Florida, 458 U.S. 782 (1982) 41 fn5, 42
Graham v. Florida, 560 U.S. 48 (2010) 50
Holbrook v. Flynn, 475 U.S. 560 (1986) 66
Irvin v. Dowd, 366 U.S. 717 (1961) 66
Lockett v. Ohio, 438 U.S. 586 (1978) 42
Miller v. Alabama, __ U.S. __ (2012) 47
Mincey v. Arizona, 437 U.S. 385 (1978) 17
Purkett v. Elem, 514 U.S. 765 (1995) 55
Ramdass v. Angelone, 530 U.S. 156 (2000) 45, 48, 49
Simmons v. South Carolina, 512 U.S. 154 (1994) 43, 44, 45, 46, 47, 48, 49, 50, 51, 52
Snyder v. Louisiana, 552 U.S. 472 (2008) 55
Solem v. Helm, 463 U.S. 277 (1983) 50
Tennard v. Dretke, 542 U.S. 274 (2004) 71
Tison v. Arizona, 481 U.S. 137 (1987) 41 fn5, 42
Washington v. Glucksberg, 521 U.S. 702 (1997) 35

OTHER FEDERAL CASES

Desmond v. United States, 345 F.2d 225 (1st Cir. 1965) 33
Lopez v. Ryan, 630 F.3d 1198 (9th Cir. 2011) 71
Miller v. Lockhart, 65 F.3d 676 (8th Cir. 1995) 17, 18
Murdaugh v. Ryan, 724 F.3d 1104 (9th Cir. 2013) 40
United States v. Morris, 568 F.2d 396 (5th Cir. 1978) 26
United States v. Necoechea, 986 F.2d 1273 (9th Cir. 1993) 26
United States v. Sanchez-Lima, 161 F.3d 545 (9th Cir. 1998) 11
Yarbrough v. Commonwealth, 519 S.E.2d 602 (1999) 48, 52

TABLE OF CITATIONS (Continued)

Page

ARIZONA SUPREME COURT CASES

Dombey v. Phoenix Newspapers, Inc., 150 Ariz. 476, 724 P.2d 562 (1986)....35 fn4
Grant v. Arizona Public Service Co., 133 Ariz. 434, 652 P.2d 507 (1982).....35 fn3
In re General Adjudication of All Rights to Use Water in Gila River System and Source, 201 Ariz. 307, 35 P.3d 68 (2001) 35 fn1
In re Peasley, 208 Ariz. 27, 90 P.3d 764 (2004).....36
In re Zawada, 208 Ariz. 232, 92 P.3d 862 (2004) 17, 36
Large v. Superior Court, In and For Maricopa County, 148 Ariz. 229, 714 P.2d 399 (1986).....35 fn3
Merryweather v. Pendleton, 91 Ariz. 334, 372 P.2d 335 (1962).....59
Moore v. Smotkin, 79 Ariz. 77, 283 P.2d 1029 (1955) 35 fn4
Pool v. Superior Court In & For Pima Cnty., 139 Ariz. 98, 677 P.2d 261 (1984).....4-5, 6, 8, 36
Roosevelt Elementary School Dist. No. 66 v. Bishop, 179 Ariz. 233, 877 P.2d 806 (1994).....73
State ex rel. Ekstrom v. Justice Court of State of Ariz. In and For Kingman Precinct No. 1, 136 Ariz. 1, 663 P.2d 992 (1983) 73
State v. Anderson, 210 Ariz. 327, 111 P.3d 369 (2005).....28
State v. Andriano, 215 Ariz. 497, 161 P.3d 540 (2007).....74
State v. Arellano, 213 Ariz. 474, 143 P.3d 1015 (2006).....39
State v. Bailey, 160 Ariz. 277, 772 P.2d 1130 (1989).....55, 56, 57
State v. Benson, 232 Ariz. 452, 307 P.3d 19 (2013) 45, 46
State v. Bible, 175 Ariz. 549, 858 P.2d 1152 (1993).....8, 9, 24, 25, 63, 65, 66
State v. Bocharski, 218 Ariz. 476, 189 P.3d 403 (2008).....7
State v. Boyston, 231 Ariz. 539, 298 P.3d 887 (2013).....46, 50
State v. Canez, 202 Ariz. 133, 42 P.3d 564 (2002).....55, 56, 57
State v. Carver, 160 Ariz. 167, 771 P.2d 1382 (1989).....5, 44
State v. Chappell, 225 Ariz. 229, 236 P.3d 1176 (2010) 46, 50
State v. Comer, 165 Ariz. 413, 799 P.2d 333 (1990).....17, 63
State v. Cornell, 179 Ariz. 314, 878 P.2d 1352 (1994).....13, 14

TABLE OF CITATIONS (Continued)

Page

ARIZONA SUPREME COURT CASES (cont'd)

State v. Cruz, 218 Ariz. 149, 181 P.3d 196 (2008) 45, 46
State v. Dann, 220 Ariz. 351, 207 P.3d 604 (2009) 45, 46
State v. DeCello, 113 Ariz. 255, 550 P.2d 633 (1976) 32
State v. Eddington, 228 Ariz. 361, 266 P.3d 1057 (2011) 63
State v. Ellison, 213 Ariz. 116, 140 P.3d 899 (2006) 9
State v. Ferrero, 229 Ariz. 239, 274 P.3d 509 (2012) 74
State v. Fulminante, 193 Ariz. 485, 975 P.2d 75 (1999) 7, 9, 14, 17, 60
State v. Gallardo, 225 Ariz. 560, 242 P.3d 159 (2010) 36, 37
State v. Garcia, 224 Ariz. 1, 226 P.3d 370 (2010) 45, 46, 51, 54
State v. Grell, 212 Ariz. 516, 135 P.3d 696 (2006) 19
State v. Hardy, 230 Ariz. 281, 283 P.3d 12 (2012) 46, 50
State v. Hargrave, 225 Ariz. 1, 234 P.3d 569 (2010) 5, 46, 50
State v. Henderson, 210 Ariz. 561, 115 P.3d 601 (2005) 8, 9, 14, 17, 61
State v. Hoskins, 199 Ariz. 127, 14 P.3d 997 (2000) 63
State v. Hughes, 193 Ariz. 72, 969 P.2d 1184 (1998) 3, 17, 18, 20, 21, 23
State v. Jorgenson, 198 Ariz. 390, 10 P.3d 1177 (2000) 36
State v. Kemp, 185 Ariz. 52, 912 P.2d 1281 (1996) 44
State v. King, 180 Ariz. 268, 883 P.2d 1024 (1994) 25
State v. Lynch, 225 Ariz. 27, 234 P.2d 595 (2010) 71
State v. McDaniel, 136 Ariz. 188, 665 P.2d 70 (1983) 61-62
State v. Medina, 193 Ariz. 504, 975 P.2d 94 (1999) 63
State v. Mincey, 115 Ariz. 472, 566 P.2d 273 (1977) 17
State v. Minnitt, 203 Ariz. 431, 55 P.3d 774 (2002) 36
State v. Montes, 226 Ariz. 194, 245 P.3d 879 (2011) 49
State v. Moody, 208 Ariz. 424, 94 P.3d 1119 (2004) 17
State v. Moore, 222 Ariz. 1, 213 P.3d 150 (2009) 19
State v. Morris, 215 Ariz. 430, 160 P.3d 203 (2007) 36, 37
State v. Murray, 194 Ariz. 373, 982 P.2d 1287 (1999) 49
State v. Newell, 212 Ariz. 389, 132 Ariz. 833 (2006) 54, 55, 56, 57, 58, 71
State v. Patton, 120 Ariz. 386, 586 P.2d 635 (1978) 70

TABLE OF CITATIONS (Continued)

Page

ARIZONA SUPREME COURT CASES (cont'd)

State v. Payne, 233 Ariz. 484, 314 P.3d 1239 (2013) 3, 13
State v. Prince, 226 Ariz. 516, 250 P.3d 1145 (2011) 29
State v. Ramirez, 178 Ariz. 116, 871 P.2d 237 (1994) 61
State v. Roque, 213 Ariz. 193, 141 P.3d 368 (2006) 3, 4, 6, 7, 15
State v. Sansing, 206 Ariz. 232, 77 P.3d 30 (2003) 27
State v. Still, 119 Ariz. 549, 582 P.2d 639 (1978) 32, 33
State v. Trostle, 191 Ariz. 4, 951 P.2d 869 (1997) 27, 32
State v. Van Dyke, 127 Ariz. 335, 621 P.2d 22 (1980) 35 fn2
State v. Walton, 159 Ariz. 571, 769 P.2d 1017 (1989) 62

ARIZONA COURT OF APPEALS CASES

State v. Hamilton, 177 Ariz. 403, 868 P.2d 986 (App. 1993) 16
State v. Lopez, 217 Ariz. 433, 175 P.3d 682 (App. 2008) 15
State v. Ramos, 235 Ariz. 230, 330 P.3d 987 (App. 2014) 20
State v. Randles, 235 Ariz. 547, 334 P.3d 730 (App. 2014) 47
State v. Rosario, 195 Ariz. 264, 987 P.2d 226 (App. 1999) 47
State v. Smith, 182 Ariz. 113, 893 P.2d 764 (App. 1995) 21, 23
State v. Williams, 220 Ariz. 331, 206 P.3d 780 (App. 2008) 60
Town of Marana v. Pima County, 230 Ariz. 142, 281 P.3d 1010 (App. 2012) 60

OTHER STATE CASES

De La Rosa v. Zequeira, 659 So.2d 239 (Fla. 1995) 64, 65, 66
Dery v. State, 68 So.3d 252 (Fla.App. 2010) 64
Fisher v. State, 736 A.2d 1125 (Md. 1999) 11
Izquierdo v. State, 724 So.2d 124 (Fla.App. 1998) 23
People v. De Vito, 21 A.D.3d 696, 800 N.Y.S.2d 250 (Supreme Ct. 2005) 16
People v. Pitts, 223 Cal.App.3d 606, 273 Cal.Rptr. 757 (Cal.App. 1990) 13

TABLE OF CITATIONS (Continued)

Page

OTHER STATE CASES (cont'd)

People v. Roadcap, 78 P.3d 1108 (Colo.App. 2003) 24
Sanchez v. State, 41 P.3d 531 (Wyo. 2002) 16
State v. Farokhrany, 259 Or.App. 132, 312 P.3d 584 (Or.App. 2013) 16
State v. Graves, 668 N.W.2d 860 (Iowa 2003) 12
State v. Soares, 72 Haw. 278, 815 P.2d 428 (Haw. 1991) 13

CONSTITUTIONAL PROVISIONS

United States Constitution
8th Amendment 70

RULES

Arizona Rules of Criminal Procedure
Rule 1.2 39
Rule 18.4 62
Rule 18.4(b) 63
Rule 18.5 62
Rule 18.5(g) 62

STATUTES

Arizona Revised Statutes
§ 13-703(A) (2001) 45, 49
§ 13-716 47
§ 13-752 39
§ 13-752(K) 39
§ 13-752(N) 39
§ 13-4032(3) 19
§ 21-211(2) 60, 61
§ 41-1604.09(I) 47, 48, 49, 50

TABLE OF CITATIONS (Continued)

Page

OTHER AUTHORITIES

ABA Guidelines for the Appointment and performance of Defense Counsel in Death Penalty Cases, Guideline 10.7(A) 40

Black's Law Dictionary (9th ed. 2009) 20

Chicago Tribune 73

http://www.mayoclinic.org/diseases-conditions/hepatitis-c/expert-answers/hepatitis-c/FAQ-20058533 69

Random House Webster's College Dictionary, 465 (1998) 21

The Arizona Republic 73

Wikipedia, http://en.wikipedia.org/wiki/Red_herring 20

With Good Reason: An Introduction to Informal Fallacies, S. Morris Engel, 190 (6th ed. 2000) (Appx. 1) 20

STATEMENT OF THE CASE

Appellant adopts the Statement of the Case in the Opening Brief.

STATEMENT OF FACTS

Appellant adopts the Statement of Facts in the Opening Brief.

ARGUMENT 1

THE SENTENCE IN THIS CASE WAS TAINTED BY SEVERAL INSTANCES OF PROSECUTORIAL MISCONDUCT.

The Opening Brief set forth several instances of prosecutorial misconduct. Lynch relies upon the Standard of Review offered in the Opening Brief. Contested facts will be discussed as appropriate.

***Discussion*:**

The State's brief contains three overarching errors, which Appellant will address, before issue-specific replies.

A. The State's evaluation of cumulative error is incorrect.

The State argues Appellant did not specifically raise cumulative error argument and has therefore waived any such review. AB 66. However, this Court evaluates cumulative error independent of briefing. *See State v. Hughes*, 193 Ariz. 72, ¶ 26 (1998) ("[T]he court necessarily has to recognize the cumulative effect of the misconduct."); *accord State v. Payne*, 233 Ariz. 484, ¶ 106 (2013); *State v. Roque*, 213 Ariz. 193, ¶ 155 (2006).

Moreover, Lynch adequately raised cumulative error. First, the structure was presented in a cumulative manner. Lynch presented several allegations of misconduct under a single header of prosecutorial misconduct. Lynch discussed the experience

and prior misconduct of Juan Martinez to argue that "the prosecutor intentionally engaged in improper conduct and 'did so with indifference, if not a specific intent, to prejudice the defendant....'" *See Roque*, 213 Ariz. 193, ¶ 155 (citation omitted); OB 72-79.

Second, Lynch repeatedly referenced the cumulative error doctrine. OB 17 (standard of review), 30, 38, 68. The State recognized such references when the State relied upon a concession. *See* AB 59. The language in the Opening Brief, in its entirety, was, "While such comment, in isolation, might not be sufficient to warrant reversal, it should be given substantial weight in an evaluation of the cumulative impact of prosecutorial misconduct." OB 68.

Lynch's inclusion of several instances when defense objections to prosecutorial misconduct were sustained is also pertinent to a cumulative error analysis. Lynch does not argue that favorable rulings were error; Lynch argues the favorable rulings were correct and demonstrate how misconduct permeated the entirety of the trial. *E.g.* OB 18 (opening statements), 20 (argumentative questions), 34 (Brams testimony), 40-41 (misstating evidence), 42 (opening statements), 55 (closing argument), 61 (voir dire), 71 (improper personalization). Sustained objections to misconduct are pertinent to a cumulative error analysis. *See Pool v. Superior Court*, 139 Ariz. 98, 109-11

(1984) (listing in Appendix several "more serious improprieties" which were accompanied by sustained objections (emphasis original)).

Finally, the State's authority is not on point. Neither *Hargrave* nor *Carver* dealt with prosecutorial misconduct. *State v. Hargrave*, 225 Ariz. 1, ¶ 22 n.6 (2010); *State v. Carver*, 160 Ariz. 167, 175 (1989). While both cases correctly note that issues must be developed, neither case holds that Appellants must affirmatively argue why the trial court correctly ruled on objections included for a cumulative error analysis in a prosecutorial misconduct claim. Such a position would unnecessarily waste this Court's time. The trial court correctly sustained the objections and sustained objections are pertinent to this Court's necessary cumulative error analysis.

B. The State's arguments regarding prejudice, harm, and fundamental error ignore how cumulative error is reviewed.

Throughout the Answering Brief, the State consistently relies upon three arguments: (1) the claim was not appropriately preserved; (2) the alleged error was not "fundamental;" and (3) there was no prejudice (or that the error was otherwise harmless). *E.g.* AB 5-6 (opening arguments); 7-9 (argumentative questions); 12, 15 ("were they lying"); 15-17 (speaking objections); 18, 20, 22-23, 26 (denigration of defense experts); 27-29 (appeals to fears); 33, 37-38 (*ad hominem* attacks); 40, 42 (vouching); 46-48, 50, 53, 56 (misstatements of law); 59-60 (comment on silence);

61-63 (improper personalization). Preservation, specifically, will be addressed in more depth on each issue.

These three arguments ignore the nature of cumulative error. "[E]ven if there was no error or an error was harmless and so by itself does not warrant reversal, an incident may nonetheless contribute to a finding of persistent and pervasive misconduct ...." *State v. Roque*, 213 Ariz. 193, ¶ 155 (2006). Appellant has even conceded that certain arguments are not sufficient alone. *See* OB 68. That a form of misconduct might have been individually harmless—or even individually not error—does not alter this Court's cumulative error evaluation.

C. Lynch appropriately presented arguments regarding sustained objections.

The State twice contended that arguments had not been appropriately raised in the appellate brief. AB 32-33, 48-49. In both circumstances, the trial court had correctly sustained a defense objection. *See* OB 40-41 (misstatements of evidence); 58 (misstatement of law). The State provides no reason why Appellant must belabor the issue and provide an in-depth analysis explaining why the trial court was correct. The trial court sustained the objections and Lynch agrees. The trial court's rulings demonstrate specific forms of prosecutorial misconduct and are appropriate for a cumulative error review. *See Pool v. Superior Court*, 139 Ariz. 98, 109-11 (1984).

D. Issue specific replies.

1. The prosecutor improperly argued inferences and conclusions during opening statements.

The bulk of the State's argument focuses on harmlessness. As discussed above, the harmlessness of any one incident does not render a cumulative error analysis impotent. *See State v. Roque*, 213 Ariz. 193, ¶ 155 (2006).

The State also argues the appropriate review standard is fundamental error because Appellant did not request a mistrial. AB 5 (citing *State v. Bocharski*, 218 Ariz. 476, ¶ 74 (2008)). *Bocharski* does not support the State's assertion. In *Bocharski*, this Court held, "When a defendant objects to an alleged act of prosecutorial misconduct, the issue is preserved; when a defendant fails to object, the Court engages in fundamental error review." *Bocharski*, 218 Ariz. 476, ¶ 74. This Court did not require a specific motion for mistrial. This statement is consistent with the purpose of preservation.

"An objection is sufficiently made if it provides the judge with an opportunity to provide a remedy." *State v. Fulminante*, 193 Ariz. 485, ¶ 64 (1999). The purpose behind fundamental error is "to discourage a defendant from taking his chances on a favorable verdict, reserving the 'hole card' of a later appeal on a matter that was

curable at trial, and then seeking appellate reversal." *State v. Henderson*, 210 Ariz. 561, ¶ 19 (2005) (internal quotation marks and modifications omitted).

Because Lynch objected to two of the arguments during opening statements and the objections were sustained, Lynch preserved the issue. Lynch did not save a "hole card." The two preserved arguments are pertinent to a cumulative error review even though the trial court sustained the objections. *See Pool v. Superior Court*, 139 Ariz. 98, 109-11 (1984).

The three additional arguments were not accompanied by objection and are reviewed for fundamental error. The State does not suggest the three additional statements were not argument. *See* AB 6. Thus, the State concedes the error.

Instead, the State argues only that there was no prejudice because the arguments could have been presented during closing arguments. AB 6. This Court evaluated improper opening arguments in *State v. Bible*, 175 Ariz. 549, 602 (1993). However, this does not end the inquiry. In the Answering Brief, the State repeats this same justification for most stages of trial. *See* AB 5-6 (applying *Bible* to opening statements), 16-17 (applying *Bible* to speaking objections), 23 (applying *Bible* to denigrating cross-examination of expert witnesses). *Bible* held that arguments are appropriate for closing and found an isolated opening argument harmless because the

argument could have been made during closings. The State would have this Court extend *Bible* in such a manner that the entire trial becomes one closing argument.

The better approach is to recognize that harmless error can rescue isolated arguments, but not pervasive argument through all stages of trial.

The State also ignores that *Bible* is a far more moderate case. Whereas *Bible* dealt with a single improper opening argument, there were five improper arguments in this case. Two arguments had sustained objections. While this Court may tolerate a single argument in openings, there is no reason to condone an opening statement that repeatedly goes beyond appropriate boundaries.

2. The prosecutor repeatedly and improperly posed argumentative questions.

The State again argues the objections did not preserve the issue. AB 7. Appellant listed only instances when objections were raised. See OB 20-21. By objecting, Lynch provided "the judge with an opportunity to provide a remedy." *State v. Fulminante*, 193 Ariz. 485, ¶ 64 (1999). Lynch did not reserve a "hole card." *State v. Henderson*, 210 Ariz. 561, ¶ 19 (2005). *State v. Ellison* is inapposite because Lynch's objections were not to the testimony, but to the prosecutor's improper questioning. *State v. Ellison*, 213 Ariz. 115, ¶ 61 (2006) ("A defendant generally waives his objection to testimony if he fails either to ask that it be stricken, with

limiting instructions given, or to request a mistrial." (emphasis added)). Lynch's objections preserved the issue.

The State next argues Lynch has not shown that the argumentative questions affected the outcome of the trial. AB 8-9. Within this argument the State also discusses the standard jury instructions. *Id.* As discussed above, the misconduct goes to cumulative error. Notably, many of Lynch's objections were sustained. *E.g.* RT 7/18/2012, 33, 198, 199, 203; RT 7/19/2012, 14, 20, 49; RT 7/23/2012, 31-32, 38-39. These sustained objections go to the cumulative weight of misconduct and an evaluation of whether the misconduct infected the entirety of the trial.

The State has only argued one allegation of misconduct might not be supported by the record. AB 7 n.3 (arguing the trial court did not state a recess was taken because of prosecutor's conduct). Because the objections appropriately preserved the issue and because the questions were argumentative (especially those which caused sustained objections), it is appropriate to consider the prosecutor's argumentative questions as part of the cumulative error evaluation.

3. The prosecutor improperly asked witnesses "were they lying" questions.

The State first argues this Court should not consider the "were they lying" questions because the present case does not fit the standard fact pattern. AB 13-14. The State notes many cases discuss "were they lying" questions from the context of

defendant testimony. *Id.* at 13. The State is also correct that Dr. Brams is not the defendant. *See id.* at 14. However, the State improperly restrains the fact pattern under which "were they lying" questions are evaluated. The State asserts *Fisher v. State*, 736 A.2d 1125, 1162-62 (Md. 1999) is "[t]he sole exception to this fact pattern ...." AB 13-14 n.4. The State ignores *United States v. Sanchez-Lima*, 161 F.3d 545, 548-49 (9th Cir. 1998) (cited at OB 21) (improper for one agent to testify that another agent was telling the truth).

The State's primary argument is that the questions were not "were they lying questions" because the goal of the cross-examination was to undermine Dr. Brams' credibility by showing that she found people credible when it suited her. AB 14. This ignores the nature of the attacks. The prosecutor did not merely point to inconsistencies; the prosecutor repeatedly accused Dr. Brams of vouching. *See* RT 7/18/2012, 191-92, 196-97 The constant harassment of an expert witness accompanied with accusations that the expert is engaging in certain conduct does not suddenly render an improper line of questioning appropriate. While the State has come up with a post-hoc explanation, the State ignores that the prosecutor asked Dr. Brams to testify to the veracity of two different witnesses in the present case. *Id.* at 197-99 (James Lynch); RT 7/19/2012 (Fraley), 69-70 (Kimberly Roon).

Had the State wanted to attack credibility on the grounds of inconsistency, such a goal could have been accomplished without asking "were they lying" questions. The prosecutor could have saved the vouching issue for closing arguments. Instead, the prosecutor asked argumentative questions "simply to make the [witness] look bad in front of the jury regardless of the answer given." *State v. Graves*, 668 N.W.2d 860, 873 (Iowa 2003).

4. The State improperly advanced arguments through speaking objections.

The State's primary argument is again that there was no prejudice. First, the State argues the speaking objections did not refer to matters which were not in evidence or present information outside the testimony and would have been appropriate for closing arguments. Second, the State argues that Appellant has not demonstrated how this impacted the trial and that the instructions remedied any prejudice.

First, as stated above in subsection (D)(1), the State's argument seeks to transform the entire trial into one closing argument. The fact that argument is permissible during a closing argument does not excuse error in different phases, it is merely a mechanism for determining whether error is harmless.

More specifically, the State has missed the nature of the argument. Appellant argued, "the prosecutor tactically sought to create an environment in which the

prosecutor could make speaking objections but the Defense could not." OB 30. The argument was not that this issue independently warranted reversal, but that it was a component of cumulative error. This intent is evidenced by the cases Appellant cited. Improper speaking objections were considered as a component of cumulative error in both *State v. Soares*, 815 P.2d 428, 430-31 (Haw. 1991) and *People v. Pitts*, 223 Cal.App.3d 606, 816 (Cal.App. 1990). Thus, the State has attempted to improperly reframe Appellant's argument. The question actually before this Court is twofold: 1) did the prosecutor use speaking objections? and 2) does the improper use of speaking objections weigh in a cumulative error analysis? The State has not disputed either issue.

5. The State improperly attacked the Defense expert during cross-examination and in closing argument.

The State first argues that fundamental error review is appropriate. Again, the State misreads the cases it relies upon. In *Payne*, this Court reviewed the defendant's preserved claims—a motion to strike and a motion to designate a juror an alternate—for abuse of discretion. *State v. Payne*, 233 Ariz. 484, ¶ 100 (2013). This Court only applied a fundamental error standard for appellant's new argument that the trial court should have *sua sponte* ordered mistrial. *Id.* at ¶ 104. Similarly, in *Cornell*, this Court applied a fundamental error review where "Defendant did not object to the colloquy

between the prosecutor and the expert witness when the matter was first raised." *State v. Cornell*, 179 Ariz. 314, 328 (1994). Eventually the defendant raised one objection, that the questions were asked and answered, which was sustained. *Id.*

Here, many of the objections were directly on point with the misconduct. *E.g.* RT 7/17/2012, 103-04 (misstatement of evidence); RT 7/19/2012 (LeMoine), 48-49 (interrupting the witness); RT 7/23/2012, 150-151 (attacking the expert witness on irrelevant issues). The misconduct was so obvious on one occasion that the trial court sustained the objection before defense counsel articulated the grounds. RT 7/18/2012, 198. Each objection was related to the misconduct and gave the trial court a timely opportunity to provide a remedy. *See State v. Fulminante*, 193 Ariz. 485, ¶ 64 (1999). Lynch was not attempting to hold a "hole card" to obtain tactical advantage. *See State v. Henderson*, 210 Ariz. 561, ¶ 19 (2005). Thus, Lynch preserved his claim of error where he objected.

The State further attempts to defend the specified attacks. First, the State argues the prosecutor appropriately asserted during opening statements and cross-examination that the Child-Pugh score came from Wikipedia. AB 19. The State's argument confuses where a protocol "came from" with where a protocol was "printed from." *See id.* at 19-20. That Dr. Altschuler printed a standardized protocol from Wikipedia does not impeach his conclusions. This is the sort of "attack [on] the

expert with non-evidence, using irrelevant, insulting cross-examination and baseless argument designed to mislead the jury" that this Court warned against in *State v. Roque*, 213 Ariz. 193, ¶ 161 (2006).

Dr. Brams's testimony was discussed in more depth above, *see* subsection (D)(3). Appellant rests upon the analysis presented in the opening brief and above.

The State also argues errors were harmless. The State notes Dr. Altschuler and Dr. Brams each had the opportunity to answer the questions. AB 20, 22. The answers do not justify the baseless attacks. While the answers could render an isolated instance insufficient to independently warrant reversal, the attacks were still improper and carry weight in the cumulative analysis. Similarly, the State relies upon the closing instructions to argue any error was harmless. AB 20, 22, 23, 26. While the standard closing instructions could justify finding an isolated instance of misconduct harmless, the instructions neither allow nor justify ongoing prosecutorial misconduct. The instructions do not save the prosecution from cumulative error analysis.

6. The prosecutor improperly appealed to the fears of the jury.

The State first argues the appropriate review standard is fundamental error because the defendant's objection was on the grounds of relevance. AB 27 (citing *State v. Lopez*, 217 Ariz. 433, ¶ 4 (App. 2008)). In *Lopez*, however, the question was whether a general objection adequately preserved an issue when the grounds for the

objection were not clear from the context. *Id.* at ¶ 5. For the language relied upon by the State, the Court of Appeals cited to *State v. Hamilton*, 177 Ariz. 403, 408-09 (App. 1993). In *Hamilton* the issue was whether a general relevance objection preserved the issue of whether expert testimony was admissible. *Id.*

The circumstance is very different here, as the ground stated for the objection, relevance, is interrelated with the claim brought. The interrelation between appeals to fear and relevance has been noted by several courts. *E.g. State v. Farokhrany*, 312 P.3d 584, 587-88 (Or.App. 2013) (prosecutorial misconduct "commonly involves an appeal to the jurors' prejudices, fears, or notions of popular sentiment by presenting to them inadmissible evidence ..."); *People v. De Vito*, 21 A.D.3d 696, 700 (N.Y Supreme Ct. 2005) ("The prosecutor's remarks were highly prejudicial, did little to impeach defendant's testimony or credibility, were irrelevant to the crimes charged, appealed to the fears and prejudices of the jury[,] and were designed to sidetrack the issue away from defendant's guilt or innocence ...."). The Supreme Court of Wyoming noted, "The fear in allowing such appeals [to passions or prejudices] is that the accused will be convicted for reasons wholly irrelevant to her guilt or innocence." *Sanchez v. State*, 41 P.3d 531, ¶ 22 (Wyo. 2002). Appeals to a jury's fears are improper because they are irrelevant.

Because of this interrelation, the objection provided the trial court the opportunity to provide a remedy. *See State v. Fulminante*, 193 Ariz. 485, ¶ 64 (1999). Lynch did not attempt to retain a "hole card." *See State v. Henderson*, 210 Ariz. 561, ¶ 19 (2005). Thus, the relevance objection preserved the issue on appeal.

The State distinguishes *State v. Comer*, 165 Ariz. 413 (1990) on the grounds that the prosecutor did not engage in name calling. AB 28. Appeals to fears are far more expansive. *E.g. State v. Mincey*, 115 Ariz. 472, 483-84 (1977) (reversed on other grounds by *Mincey v. Arizona*, 437 U.S. 385 (1978)) (finding argument that jury should not tell drug dealers they merely had to say they did not know they were shooting a police officer was an appeal to fears); *State v. Moody*, 208 Ariz. 424, ¶¶ 149-150 (2004) (finding argument that a not guilty by reason of insanity verdict would result in a defendant's release was an improper appeal to fears).

This Court looked at a similar argument in *State v. Hughes*, 193 Ariz. 72 (1998). This Court found, "[a] comment about a future 'murder or something like that' is an improper appeal to fears." *Id.* at ¶ 70. This Court later found such an argument violated the ethical rules. *In re Zawada*, 208 Ariz. 232, ¶ 13 n.2 (2004).

The Eighth Circuit found a similar argument was a due process violation in *Miller v. Lockhart*, 65 F.3d 676 (8th Cir. 1995). There, the defendant had a history of escape and the murder was committed "to prevent arrest or effect escape from

custody." *Id.* at 679. During closing, the prosecutor highlighted the defendant's escape history. *Id.* at 682. The defense objected, "arguing that the prosecutor's statements implied that Miller would escape from jail and exact revenge upon the jury." *Id.* The Eighth Circuit found the comments on escape, which were interwoven with other impropriety, were a due process violation. *Id.* at 683-84.

Hughes and *Miller* demonstrate why the line of questioning here was improper. The argument in this case is similar to the argument in *Hughes*. Whereas the prosecutor in *Hughes* argued that a defendant found insane would be released and commit future murders, the prosecutor here argued that if Mr. Lynch was not put to death, Mr. Lynch would escape or assault a detention guard. The argument was designed to warn the jury that a sentence less than death would risk escape or assault. The argument presented in *Miller* was similar but one fact makes this case a far worse violation: Lynch has no pertinent history of escape or assault on correctional officers.

The examination was not limited to "highlighting the necessarily speculative nature of Aiken's testimony," as the State suggests. *See* AB 28. The prosecutor did not ask whether the witness could guarantee Lynch would never escape; the prosecutor used a specific and recent example of an escape where the end result was further murders. The prosecutor did not ask if Aiken could guarantee Lynch would never assault an officer; the prosecutor asked Aiken if low likelihood would be

"comfort" to an assaulted officer. The State pointed to nothing in the record to support the prosecutor's suggestion that Lynch was an escape or assault threat.

Finally, Aiken's ability to answer the questions does not render the misconduct meaningless. Through his questioning, the prosecutor encouraged the jury to sentence Lynch because other prisoners had escaped from a private prison and because other prisoners have assaulted guards in the past. Even if the misconduct does not independently warrant reversal, reversal is appropriate for cumulative error.

7. **The prosecutor repeatedly misstated the evidence.**

The State glosses over an important fact shared by each of the alleged misstatements of evidence: the trial court sustained objections for each instance. *See* RT 7/19/2012 (LeMoine), 3; RT 7/19/2012 (Fraley), 42; RT 8/9/2012, 66. While the State attempts to provide perfunctory explanations for two misstatements, AB 30, 32, the State ignores that this Court defers to a trial court's factual findings. *See State v. Grell*, 212 Ariz. 516, ¶ 58 (2006); *State v. Moore*, 222 Ariz. 1, ¶ 17 (2009). To sustain an objection for misstating the evidence, the trial court necessarily made a factual determination. To the extent the State disagrees with the trial court's rulings, this Court should defer to the trial court's conclusion. To the extent this could be considered a question of law, rather than fact, the State did not file a cross-appeal and has waived the argument. *See* A.R.S. § 13-4032(3).

The State also argues Appellant waived review because the Opening Brief did not explain how the comment misstated the evidence. The trial court sustained the objections and Lynch agrees with the trial court: the prosecutor misstated the law. Undersigned counsel sees no reason to belabor this Court's time explaining the obvious. The misstatements should be considered as part of this Court's cumulative error analysis.

8. The State lodged improper *ad hominem* attacks against Defense counsel.

The State's argument regarding the *ad hominem* attacks fails because the State fails to accurately evaluate the distinction between proper and improper conduct. The juxtaposition between *State v. Hughes*, 193 Ariz. 72 (1998), and *State v. Ramos*, 235 Ariz. 230 (App. 2014), clarifies the distinction.

In *Ramos*, the prosecutor argued defense counsel was "raising distractions or 'red herrings.'" 235 Ariz. 230, ¶ 24; *see also* AB 35. A "red herring" is an informal fallacy. S. Morris Engel, With Good Reason: An Introduction to Informal Fallacies, 190 (6th ed. 2000) (Appx. 1) ("Engel"); *see also* "Red herring," Wikipedia, http://en.wikipedia.org/wiki/Red_herring; "Red herring," Black's Law Dictionary (9th ed. 2009) ("An irrelevant legal or factual issue, usu. intended to distract or mislead.") The "red herring" has also been known as: fallacy of irrelevant thesis, irrelevant conclusion, ignoring the issue, befogging the issue, and diversion. Engel, 190. Put

simply, a prosecutor who argues that defense counsel presented a "red herring" legitimately combats the argument. While such an argument may have a side-effect of accusing an opposing attorney of misleading the jury, the red herring is well established and understood as a way to discuss an argument's logical underpinnings.

In *Hughes*, however, the prosecutor repeatedly argued the defense attorney "fabricated" an insanity defense. *State v. Hughes*, 193 Ariz. 72, ¶¶ 58-61 (1998). This Court found the arguments improper. *Id.*, *see also State v. Smith*, 182 Ariz. 113, 115-16 (App. 1995) (argument "defense counsel is a liar" improper).

Nonetheless, the State asserts, "the prosecutor did not impugn or insult opposing counsel by stating that Lynch's mitigation theories were 'fabricated' by the defense or that the defense counsel was a liar." AB 36. This argument ignores the common meaning of the words "myth" and "fantasy," and how they relate to the definitions of words which have been found squarely improper.

"Fabricate," as used in *Hughes*, means "to devise; invent ...." Random House Webster's College Dictionary, 465 (1998). "Lie," as used in *Smith*, means "a false statement made with deliberate intent to deceive; a falsehood." *Id.* at 758. "Fantasy," as used in this case, means "a supposition based on no solid foundation; illusion." *Id.* at 471. "Myth," as used here, means "an invented story, fictitious person, etc." *Id.* at 867 The concepts of fabrication, myth, lie, and fantasy are closely interrelated.

The State argues, "the prosecutor's use of the terms 'myth' and 'fantasy' was simply a more descriptive way of saying that the defense's assertions and theories regarding the mitigation were not supported by the evidence ...." AB 36. This assertion ignores the context of the arguments. The very beginning of the prosecutor's closing argument supports the conclusion that the prosecutor sought to accuse the defense attorneys of "lying" and "fabricating" mitigation evidence but simply chose to use different words:

> Good afternoon. The defendant's presentation through the evidentiary portion as well as the closing argument has been to take a myth, which is an unfounded belief, to take a myth and present it to you as fact without regard to the sunlight of truth.

RT 8/9/2012, 47 The prosecutor focused on what the defense attorneys had done. The prosecutor accused the defense attorneys of taking "an unfounded belief" and presenting it as fact. The prosecutor repeatedly argued the fantasyland was the product of the attorneys. *Id.* at 48 ("fanciful world they have"), 51 ("even if they want to take you to a fanciful world"), 62 ("The other thing that they tell you in this mythical land of theirs"), 63 ("This is the upside down, where up is down and left is right world, where they want to present these to you"), 64 ("in this mythical, horrific upside down world they are asking you to walk into"), 66 ("in this horrifically mythical world of theirs, this fantastical place ... They have a guide for you that's

going to take you back"), 67 ("this fantastical colored world that she wants to taint for you"), 77 ("They present it to you anyway, because in this fanciful world of theirs"), 82 ("from the never-land that they want you to consider"). This advocacy aligns with the common definition of "fabricate" and "lie" as used in *Hughes* and *Smith*.

The arguments were not attached to the evidence. The prosecutor's repeated assertions that the defense lawyers presented "myth" and "fantasy" were accusations that the lawyers were lying. Neither "myth" nor "fantasy" is an argument of logical fallacy. The prosecutor made clear his intent—to accuse the defense attorneys of fabricating mitigation. That the prosecutor used different words than those expressly criticized by this Court does not alter this conclusion. *See Izquierdo v. State*, 724 So.2d 124, 125-26 (Fla.App. 1998) (finding prosecutor's reference "to the defense as a 'pathetic fantasy'" improper).

Criminal defense attorneys, just as prosecutors, are entitled to a certain expectation of decorum when advocating for clients. Moreover, defendants are entitled to a trial where disparaging remarks about attorneys are not mistaken for legitimate advocacy. Express attacks against attorneys should play no role in the criminal justice system and criminal defendants should not be subjected to conviction upon the balancing of attorney credibility rather than evidence.

Even where courts have approved of language such as "fantasy," it has been tolerated in the context of attacking a defendant's testimony, not the argument and integrity of defense counsel. *E.g. People v. Roadcap*, 78 P.3d 1108, 1114 (Colo.App. 2003) (concluding prosecutor's argument which referred to "going into defendant's 'fantasy world'" was "fair comment on the evidence specifically, defendant's testimony about the events" (emphasis added)). Lynch, did not testify and the prosecutor's arguments were directed towards the defense attorneys. Such arguments are improper *ad hominem* attacks, not logical arguments, and seek to obtain conviction by discrediting the defense attorney rather than discussing the merits.

9. The prosecutor improperly vouched during closing arguments.

a. The State placed the weight of the government behind the credibility of its position.

The State presents two types of arguments. For the first three allegations, the State suggests the prosecutor argued the identity of the actual killer as a reasonable inference from the evidence. For the fourth allegation, the State argues the prosecutor's statement was akin to proper "the State submits" language.

The State's first argument illustrates the impropriety. A prosecutor may "urge the jury to draw reasonable inferences from the evidence, and suggest ultimate conclusions." *See State v. Bible*, 175 Ariz. 549, 601-02 (1993). A prosecutor may

not, however, provide personal assurances. *State v. King*, 180 Ariz. 268, 277 (1994) ("The first type of vouching involves personal assurances of a witness's veracity ...."). Recognizing this distinction, the State is incorrect. The prosecutor did not argue the jury could reasonably conclude one fact from what was presented; the prosecutor personally assured the jury that certain facts were true.

Each of the first three factors went to the identity of the actual killer, a disputed point. No jury had unanimously concluded Lynch was the actual killer, *see* I. 310, and Lynch was unable to present the previous jury verdict to show this split, *see* I. 661, 684. Nonetheless, the prosecutor personally assured the jury that Lynch was the actual killer. RT 8/9/2012, 48 ("and he did"). Regarding DNA evidence, the prosecutor assured the jury the Scottsdale Police Department acted competently. *Id.* at 51 ("did its darndest" and "they tried"). Finally, the prosecutor assured the jury that DNA and blood spatter evidence was akin to law, even if colloquial. *Id.* at 52-53 ("Those are the law").

None of these arguments were phrased in a manner consistent with permissible argument. In *Bible*, the prosecutor argued the victim "may have been tormented." *Bible*, 175 Ariz. at 602. An argument that a person "may have" done something is very different from the personal assurance "and he did."

The State's second argument compares the language in this case, "by no means the State does not agree that those are mitigating circumstances," with the phrase "the State submits." *See* AB 42. This analogy is incorrect. The Ninth Circuit noted the "I submit" language is a way to avoid personal assurances. *United States v. Necoechea*, 986 F.2d 1273, 1279 (9th Cir. 1993). The Fifth Circuit explained the distinction is "between the earnest imploring of an advocate of conclusions the jury should draw from evidence and, on the other hand, the statement of counsel of what he believes, personally, about the case, a witness in the case, or any other issue ...." *United States v. Morris*, 568 F.2d 396, 402 (5th Cir. 1978).

The prosecutor's argument in this case falls on the improper side of the line. This was not "the earnest imploring of an advocate of conclusions the jury should draw from evidence," but "the statement of counsel of what he believes, personally, about the case, a witness in the case, or any other issue." The prosecutor made his opinion clear: he did not agree that any of the alleged mitigating circumstances "are mitigating circumstances." This involved an expression of both factual and legal beliefs. The prosecutor bolstered his personal opinion by attaching the label of "the State" to his belief.

b. The State implied facts not in evidence supported conviction.

The State is correct that a portion of the Potts testimony was introduced on August 6, 2012, and that portion contained an indication that the "little guy" answered the door. Appellant withdraws this claim.

10. The State urged the jury to apply the wrong legal standard.

a. Failure to Appreciate Wrongfulness

The State's first argument, regarding appreciation of wrongfulness of conduct, handily defeated the strawman they created. The State has correctly pointed out that when intoxication is the sole basis for a lack of appreciation, a person's attempts to avoid prosecution shortly after an offense moot the mitigating factor. *See* AB 46 (citing *State v. Sansing*, 206 Ariz. 232, ¶ 26 (2003)). Certainly, intoxication was a portion of the basis for this mitigating factor, but it was not the complete basis for the mitigating factor and was not a subject in the Opening Brief. The State has not responded to the argument in the Opening Brief.

The failure to appreciate mitigator also applies in the context of mental impairment. *State v. Trostle*, 191 Ariz. 4, 19 (1997). The Opening Brief discussed how Lynch fell between the extremes previously evaluated by this Court. OB 57-58.

Further, mental impairment should not be equated to intoxication. Where a person often voluntarily consumes alcohol or drugs to become intoxicated, Lynch did

not choose to be the victim of abuse throughout his childhood. Where a person can sober up from intoxication, Lynch cannot "sober up" from his mental impairment. The prosecutor's argument misstated the law.

b. History of Substance Abuse

The State next argues the prosecutor's arguments regarding a history of substance abuse did not misstate the law or encourage the jury to consider substance abuse as an aggravating factor. The State's initial premise, that attorneys may argue mitigation should not be given weight, is accurate. *See* AB 48; *State v. Anderson*, 210 Ariz. 327, ¶ 97 (2005). Here, though, the prosecutor did not merely argue the evidence of substance abuse should be given minimal weight, the prosecutor argued the substance abuse history should be considered aggravating.

In *Anderson*, the case relied upon by the State, the prosecutor argued a defense expert "didn't testify about any links, any connections between the defendant's upbringing and him murdering people. Nothing in his childhood caused that." 210 Ariz. 327, ¶ 96. The prosecutor also "told the jury that it would have to decide whether any mitigation evidence was relevant." *Id.* The arguments were proper because they went to weight of mitigating evidence. *Id.* at ¶ 97

Here, the prosecutor could have argued that minimal weight should be given to substance abuse because there were no links to the murder. However, the prosecutor

went further, by arguing substance abuse was a "bad thing" and that relying upon a substance abuse history was "upside down logic." This reframed substance abuse history as aggravation.

c. Misuse of Pornographic Videos

The State argues the misstatement regarding how pornographic videos should have been considered was not preserved. AB 48-49. The trial court sustained this objection and undersigned counsel agrees with the ruling. There is no reason to engage in a lengthy discussion. To the extent the State now tries to argue the trial court's ruling was incorrect, the State has waived any such argument because the State has not filed a cross-appeal.

d. Dysfunctional Childhood

Again, the State correctly notes the legal premise but ignores the context of the present case. The State is permitted to argue that a dysfunctional childhood is sufficiently disconnected to warrant little weight. *See State v. Prince*, 226 Ariz. 516, ¶¶ 109-111 (2011). However, *Prince* also explains why the prosecutor's argument was error in this case. Even with decreased weight, a traumatic childhood is still a mitigating factor. *Id.* at ¶ 109.

At no time does a traumatic childhood morph into something other than a mitigating circumstance. However, the prosecutor argued so much time had passed

that the traumatic childhood became "an excuse, not a mitigating factor." RT 8/19/2012, 74. The context of the prosecutor's argument does not change this conclusion. The prosecutor argued, "So now you're left with a decision as to whether or not that's a mitigating factor. One of the things to consider in determining whether it's even a mitigating factor is remoteness." *Id.* at 73. The prosecutor's goal was not to argue that the mitigating factor should be given little weight. The prosecutor did not advise the jury that remoteness allowed the jury to assign little weight. The prosecutor incorrectly advised the jury that remoteness allowed the jury to conclude that a traumatic childhood was not a mitigating circumstance. This argument advised the jury, in essence, that a temporal or causal nexus has to exist between the abuse and offense. The argument misstated the law.

e. Life Sentence

The State confirms the first step of Lynch's syllogism when the State describes the prosecutor's argument as, "to find his other sentences mitigating would have the perverse effect of rewarding Lynch for having committed other crimes in addition to the murder." AB 52. This is precisely what the prosecutor's argument communicated to the jury and precisely why the argument misstated the law. The law does not consider a separate sentence as a perverse reward for committing separate offenses. *See Ball v. United States*, 470 U.S. 856, 865 (1985) ("A separate conviction, apart

from the concurrent sentence, has potential adverse collateral consequences that may not be ignored."). The State also ignores that any sentence of Life does not currently carry any procedural mechanism for parole. Thus, Lynch could only ever obtain release, even hypothetically, if he served his life sentence, an additional 21 years, and then convinced the governor to grant clemency.

The State asserts the prosecutor's argument was moral, rather than legal. This position is irrelevant. Even if the prosecutor intended his statement as "moral," the prosecutor discussed how separate sentences are legally treated. In making his "moral" argument, the prosecutor characterized separate sentences in a legally incorrect manner. The prosecutor did not characterize a life sentence as insufficient; the prosecutor characterized a life sentence as a "free bite of the apple." A concurrent life sentence is not legally a "free bite."

f. (F)(6) Aggravator

The State's primary response is factual. The State asserts the Opening Brief "is simply wrong" and that the prosecutor addressed two different aggravating factors as (F)(5) and (F)(6). This argument ignores the context. The prosecutor separated his analysis of cruelty and heinousness. *See* RT 8/9/2012, 81. Immediately after discussing the (F)(6) as two separate concepts, the prosecutor stated, "So what is it then when you're going to compare those three aspects, the murder and the

aggravating circumstances, but there is also this indication that it was for pecuniary gain." *Id.* at 81-82. The prosecutor made clear he had already discussed "three aspects, the murder and the aggravating circumstances ...." The prosecutor made clear pecuniary gain was something in addition to the three aspects he had already discussed. At that point, he had discussed cruelty and heinousness, a single factor, but attempted to portray this as more than one aggravating factor.

11. The prosecutor commented on Mr. Lynch's decision to not testify.

The State offers two arguments to justify the prosecutor's question: (1) the questions were not akin to the arguments in *State v. DeCello*, 113 Ariz. 255 (1976), or *State v. Trostle*, 191 Ariz. 4 (1997), because the prosecutor did not expressly note that Lynch had not taken the stand, and 2) the questions were aimed at highlighting the victim's mental anguish. AB 58-59. The State ignores the impact of the question: Lynch was the only person who could answer the posed questions.

State v. Still, 119 Ariz. 549, 551 (1978), analyzed comments on a defendant's failure to testify. While prosecutors may note that certain facts are uncontested, "An exception to this rule occurs when it appears that the defendant is the only one who could explain or contradict the evidence offered by the State." *Id.* In *Still*, the defendant "was the only person who could possibly contradict or explain the State's

evidence." *Id.* While the prosecutor in *Still* physically pointed at the defendant, such conduct was not necessary for this Court's decision. *Id.*

In *Desmond v. United States*, 345 F.2d 225, 227 (1st Cir. 1965) (cited favorably by *Stills*, 119 Ariz. at 551), the prosecutor merely argued the government witnesses had not been impeached or contradicted. Because "[n]o one but appellant ... could have contradicted the government witness," the First Circuit found the argument improper. *Id.*

Here, the prosecutor's closing argument specifically asked questions about what happened the night the victim died. The prosecutor asked "What's going on?" and "Were words exchanged?" RT 8/9/2012, 86. While he did not point, the prosecutor specifically referenced who could answer: "this guy sitting in this courtroom." *Id.* After posing his questions, the prosecutor commented, "Who knows." *Id.* Like *Still* and *Desmond*, Lynch was the only person who could have explained what was going on and answer whether words were exchanged. Thus, the prosecutor improperly drew the jury's attention to Lynch's decision to remain silent.

12. Improper personalization during closing argument.

Regarding the first instance of improper personalization, the State has not argued the prosecutor's conduct was proper. AB 61-62. The State relies exclusively

on harmlessness. *Id.* As discussed above, misconduct which prompted a sustained objection is still appropriate for cumulative error.

Regarding the second instance of personalization, the State advances two arguments: (1) the prosecutor's argument did not encourage the jury to place themselves in the role of victims, *id.* at 62, and (2) the poem itself should not be considered, *id.* at 62-63. Both arguments are incorrect.

First, even the section quoted by the State in the Answering Brief encouraged the jury to identify themselves as victims. The prosecutor argued, "every person's death diminishes, so therefore send no one to find for whom the bell tolls, it tolls for thee." RT 8/9/2012, 89. This language linked the jurors to the victim. The prosecutor twice repeated, "it tolls for each and every one of you," speaking directly to the jury. *Id.* The prosecutor argued the victim's death diminished each of the jurors and that, as a result of the death of the victim, the bells tolled for the jurors. Even ignoring the well understood context of Donne's poem, this language alone was an improper personalization.

Second, Donne's poem should not be ignored. While this Court does not consider evidence outside the record, this Court can certainly consider well-known

literature. This Court has quoted the likes of Mark Twain,[1] Charles Dickens,[2] George Orwell,[3] and William Shakespeare.[4] While this Court has not cited to John Donne, the United States Supreme Court has noted, "There is truth in John Donne's observation that 'No man is an island.'" *Washington v. Glucksberg*, 521 U.S. 702, 741 (1997). Just as with Twain, Dickens, Orwell, or Shakespeare, John Donne is a part of our society's literary history. The poem is well-known and a reasonably educated juror is likely aware of the reference. In light of the State's failure to present any further reason why the prosecutor's argument was appropriate, this Court should find the argument improper.

13. Mr. Martinez knew his conduct was improper and intended the misconduct to avoid a life verdict.

The State argues Lynch's reference to Martinez's prior conduct is irrelevant because Lynch did not show "intentional conduct which the prosecutor knows to be improper and prejudicial, which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial" or "misconduct that so

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[1] *In re General Adjudication of All Rights to Use Water in Gila River System and Source*, 201 Ariz. 307, ¶ 51 (2001).

[2] *State v. Van Dyke*, 127 Ariz. 335, 338 (1980) (V.C.J. Holohan, dissenting).

[3] *Large v. Superior Court, In and For Maricopa County*, 148 Ariz. 229, 239 (1986); *Grant v. Arizona Public Service Co.*, 133 Ariz. 434, 457 (1982).

[4] *Dombey v. Phoenix Newspapers, Inc.*, 150 Ariz. 476, 479-80 (1986); *Moore v. Smotkin*, 79 Ariz. 77, 79 (1955).

infected the trial with unfairness as to make the resulting conviction a denial of due process." AB 63-64. The State's argument misses the mark because a prosecutor's experience and history is relevant in determining whether the prosecutor's conduct was intentional and whether a prosecutor's conduct was a consistent pattern. The State ignored the authorities cited in the Opening Brief on this point. *See* OB 73-74 (citing *State v. Minnitt*, 203 Ariz. 431 (2002); *Pool v. Superior Court In & For Pima Cnty.*, 139 Ariz. 98 (1984); *State v. Jorgenson*, 198 Ariz. 390 (2000); *In re Peasley*, 208 Ariz. 27 (2004); *In re Zawada*, 208 Ariz. 232 (2004)).

The State points out that several of Mr. Martinez's cases have not resulted in findings of misconduct. AB 64-65. This is correct and is why Lynch focused largely on two cases where this Court found misconduct: *State v. Gallardo*, 225 Ariz. 560, ¶¶ 41-42 (2010), and *State v. Morris*, 215 Ariz. 324, ¶¶ 57-60 (2007). However, even those cases where misconduct was not alleged inform this Court's consideration. Mr. Martinez's history before this Court demonstrates that his conduct is not above reproach and is commonly the source of criticism.

Regarding Martinez's well-established history of improper personalization, the State merely reiterates its previous arguments. *See* AB 65-66. The State's argument ignores an important point: Mr. Martinez knows he is not supposed to appeal to the jury's sympathy and passions by engaging in improper personalization in light of this

Court's rulings in *State v. Gallardo*, 225 Ariz. 560, ¶¶ 41-42 (2010), and *State v. Morris*, 215 Ariz. 324, ¶¶ 57-60 (2007). Regardless of whether the first instance, during opening statements, was stricken, the improper personalization was presented to the jury. In light of Mr. Martinez's long history of improper personalization, his decision to engage in such conduct was intentional. This history also provides context for Mr. Martinez's intent regarding the argument presented in closings. That Mr. Martinez was able to come up with a more creative method for encouraging the jury to place themselves in the victims' shoes does not mean Mr. Martinez's motives were appropriate. Mr. Martinez wanted to circumvent this Court's previous rulings and encourage the jury to consider themselves as victims. Martinez's experience further demonstrates his indifference to the resulting unfairness.

***Conclusion*:**

Because the prosecutor committed misconduct, this Court should vacate the sentence, and order a new sentencing.

ARGUMENT 2

THE TRIAL COURT IMPROPERLY LIMITED THE SENTENCING PHASE WHEN THE TRIAL COURT DENIED LYNCH'S MOTION FOR RETRIAL OF AGGRAVATING CIRCUMSTANCES AND NOTICE OF MITIGATION EVIDENCE.

The Opening Brief explained why Lynch was entitled to a new sentencing proceeding, including new findings of aggravating factors. Lynch relies upon the Standard of Review and Factual Background in the Opening Brief.

Discussion:

The State's first argument is that Lynch did not preserve this argument because Lynch did not file a Motion to Reconsider. *See* AB 68-70. The State's argument is inaccurate. On September 7, 2010, Lynch filed a Motion to Recall Mandate before this Court in CR-06-0220-AP Appx. 2. The Attorney General's Office filed a Response. Appx. 3 (9/22/2010). Lynch then filed a Corrected Motion to Recall Mandate and a Reply. *See* Corrected Motion to Recall Mandate 10/25/2010 (Appx. 4); Corrected Reply in Support of Motion to Recall Mandate 10/25/2010 (Appx. 5). Lynch argued any remand must be for a full sentencing proceeding. *See* Appx. 2 and 4. This Court summarily denied the Motion to Recall. Appx. 6. This Court's order was docketed with the Superior Court. I. 622.

The State was aware of this Motion for two reasons: 1) the Attorney General's Office responded to the Motion, *see* Appx. 3, and 2) the trial record clearly indicated this Court had declined the Motion without opinion, I. 622. Because this Court summarily denied the Motion, the motion filed before the trial court was necessary to preserve the issue. Lynch appropriately preserved the claim.

The State's second argument seeks to avoid the plain language of A.R.S. § 13-752. Without citation to authority, the State argues, "Lynch's approach is overly formalistic." AB 71. Lynch's approach is consistent with the language of A.R.S. § 13-752. The State's only argument regarding methods of interpretation is premised upon Ariz.R.Crim.P 1.2. AB 71. The State argues this Court's order ensured simplicity in procedure and eliminated delay and expense. However, the State ignores the most basic principle of statutory construction—when the plain language is clear, this Court enforces the plain language of a statute. *State v. Arellano*, 213 Ariz. 474, ¶ 9 (2006).

The statute's framework also indicates the legislature intended to differentiate between two types of re-sentencings: 1) those which occur after a mistrial or hung jury and 2) those which result from the appellate, post-conviction relief, or *habeas* process. When a jury cannot reach a verdict, a new jury is impaneled and aggravation is not retried. A.R.S. § 13-752(K). When a death sentence is overturned, a defendant

is re-sentenced "as if the original sentencing had not occurred." A.R.S. § 13-752(N). The State's interpretation confuses the subsections and imposes a single standard when the legislature clearly set forth two.

The State's interpretation is also inconsistent with public policy goals. The Ninth Circuit has explained that a jury's consideration of mitigation is inextricably interwoven with the consideration of aggravation. *Murdaugh v. Ryan*, 724 F.3d 1104, 1116 (9th Cir. 2013) ("A jury that has listened to extensive mitigating evidence about the defendant's good character, for instance, may be much less likely to find the defendant acted heinously or cruelly in committing the offense."). This interconnection was particularly important in Lynch's case.

Further, mitigation investigation is constantly ongoing in capital cases. *See* ABA Guidelines for the Appointment and performance of Defense Counsel in Death Penalty Cases, Guideline 10.7(A) ("Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty."). Here, mitigation developed. Most obviously, Lynch's Hepatitis C advanced.

The legislature's scheme recognizes this reality. Where there is merely a mistrial or a hung jury, and thus a low likelihood that new investigation will produce important evidence, aggravation is not retried. Where the new sentencing results from

appellate or collateral proceedings, there is a greater chance that new investigation may reveal important information regarding aggravating factors.

The scheme set up by the legislature recognizes that aggravation and mitigation is interwoven and that ongoing investigations in capital cases may lead different juries to different findings during aggravation. When a capital defendant's sentence has been overturned as a result of appellate proceedings, the scheme appropriately requires retrial of the entire sentencing process—both aggravation and mitigation.

The State's final argument that Lynch received an individualized sentence ignores the exclusion of the guilt-phase verdict. The State rests its argument upon the notion that this Court approved of a retrial proceeding and Lynch did not demonstrate the jury lacked a full opportunity to hear the shortcomings regarding aggravation. AB 75. While Lynch had the opportunity to try to show some shortcomings, any attempt was merely academic. Lynch did not have the ability to argue that aggravation should not even be found. The trial court's instructions that the jury was bound to find and rely upon the aggravation undermined any of Lynch's attempts to argue minimal weight should be given. Moreover, the jury had absolutely no opportunity to consider the *Edmund/Tison*[5] findings.

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[5] *Enmund v. Florida*, 458 U.S. 782 (1982); *Tison v. Arizona*, 481 U.S. 137 (1987).

The State's combined arguments are logically inconsistent in light of the *Edmund/Tison* verdict. The State argues the ruling on the *Edmund/Tison* issue was correct and that the jury had access to all shortcomings. Both cannot be true. The previous jury was confronted with deciding if Lynch was the actual killer and could not decide. That jury was exposed to shortcomings not presented to the current jury. Retrial of the *Edmund/Tison* phase would have corrected the inequity. At a minimum, the *Edmund/Tison* verdict should have been given.

The State's argument regarding the *Edmund/Tison* verdict form itself is also problematic. The State argues that the verdict form was not "constitutionally relevant mitigation." AB 77 This is incorrect. That no jury has ever unanimously concluded Lynch was the actual killer is a "circumstance of the offense that [provides] a basis for a sentence less than death." *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978). "[A] defendant's comparatively minor role in the offense" is a mitigating factor. *Id.* at 608. Moreover, that no jury ever unanimously found that Lynch was the actual killer is relevant to the weight of aggravation. The prosecutor repeatedly emphasized his opinion that Lynch was the actual killer. RT 8/9/2012, 47, 48, 56, 61, 80.

Because the scope of the remand deprived Lynch of a full sentencing and prevented Lynch from presenting evidence that went to the balance of aggravating and mitigating factors, Lynch was deprived of his right to an individualized sentencing.

ARGUMENT 3

THE TRIAL COURT VIOLATED LYNCH'S RIGHTS WHEN THE COURT IMPROPERLY REFUSED TO INSTRUCT THE JURY ACCORDING TO *SIMMONS V. SOUTH CAROLINA*.

The Opening Brief explained why the trial court should have given an instruction pursuant to *Simmons v. South Carolina*, 512 U.S. 154 (1994). Lynch relies upon the Standard of Review and Factual Background in the Opening Brief. This brief first addresses an overarching misconstruction in the Answering Brief before following the analysis from the Opening Brief.

Discussion:

1. The State misconstrues the argument advanced in the Opening Brief.

The State has misconstrued the argument in the Opening Brief. The State focused largely upon Lynch's offered waiver of parole. *See* AB 79, 81. Lynch referenced the proposed waiver because it was a part of the procedural and factual history. However, the Opening Brief did not frame the error around the rejection of the waiver. Lynch argued a *Simmons* instruction was necessary regardless of the waiver. *See* OB 97, 101-06.

Thus, the State's first argument, that "the trial court did not abuse its discretion by rejecting Lynch's waiver of a parole-eligible sentence," is irrelevant. *See* AB 81. Even if the trial court appropriately rejected the waiver of parole-eligible sentence, the

trial court still should have instructed the jury pursuant to *Simmons* because parole was abolished.

2. A *Simmons* instruction is required when future dangerousness is at issue and a defendant is not eligible for parole.

The State has not disagreed with Lynch's evaluation of *Simmons v. South Carolina*, 512 U.S. 154 (1994). The State merely argues that *Simmons* does not apply.

3. Future Dangerousness was at issue in this case.

The first step of Lynch's syllogism was that future dangerousness was at issue in the present case. *See* OB 100-01. The State briefly argued, "even if [Lynch] were correct that his future dangerousness was at issue ... Arizona law does not prohibit his release on parole." The State never developed any argument regarding future dangerousness. Briefs "must present significant arguments, supported by authority, setting forth [a party's] position on the issues raised." *State v. Carver*, 160 Ariz. 167, 175 (1989). "Failure to argue a claim usually constitutes abandonment and waiver of that claim." *Id.* Issues which are insufficiently briefed are also abandoned. *E.g.*, *State v. Kemp*, 185 Ariz. 52, 57 (1996). Because the State failed to develop any argument, the State waived any claim that future dangerousness was not at issue. As developed in the Opening Brief, future dangerousness was at issue in this case.

4. Lynch is not eligible for parole; parole has been abolished.

The State's second argument is that Lynch was not ineligible for parole. AB 81-83. The State is correct that *Simmons* applies only when there is no possibility for parole. AB 81 (citing *Ramdass v. Angelone*, 530 U.S. 156, 169 (2000)). However, the State has not demonstrated how Lynch was eligible for parole. Rather, the State conceded there is no "currently existing parole mechanism ...." AB 83.

The State relies upon A.R.S. § 13-703(A) (2001) and this Court's prior decisions. The issues previously before this Court, though, did not ask this Court to squarely address whether defendants convicted of first degree murder were parole eligibile. Because previous challenges were insufficient, this Court has never evaluated the impact of parole abolition on the need for a *Simmons* instruction. These cases fall into two categories: cases which presumed the availability of parole and cases which wanted an instruction that referenced ineligibility for any form of release.

For the first class, in *State v. Cruz*, 218 Ariz. 149, ¶ 40 (2008), the defendant asked for a pretrial ruling regarding whether he would be sentenced to life without parole, thereby presuming parole eligibility. Similarly, the parties presumed parole eligibility on appeal in *State v. Dann*, 220 Ariz. 351, ¶ 122 (2009) and *State v. Garcia*, 224 Ariz. 1, ¶ 74 (2010). The parties in *State v. Benson*, 232 Ariz. 452, ¶¶ 52-54 (2013), argued the appellant had a "right" to parole.

Regarding the second class, in *State v. Hargrave*, 225 Ariz. 1, ¶ 53 (2010), the appellant argued a *Simmons* instruction should have been read because he was "not likely to be actually released ...." In *State v. Chappel*, 225 Ariz. 229, ¶¶ 42-43 (2010), the appellant merely argued the instruction read, which referred only to a possibility of release, was inaccurate. This Court ruled the instruction accurately described the sentencing options. *Id.* at ¶ 43. This Court also found that the jury instruction accurately stated the law in *State v. Hardy*, 230 Ariz. 281, ¶ 58 (2012). The requested instruction in *State v. Boyston*, 231 Ariz. 539, ¶ 68 (2013), "referred more broadly to any form of release or commutation of sentence ...."

All litigation preceding this case has made one of two fundamental errors. In the first class of cases, the parties begged the question of whether parole was available. Instead, the parties presupposed the availability of parole. Thus, most of these cases deal with the question of whether a defendant can presentence himself. Appellants on the other side confused parole and other forms of release.

Lynch, on appeal, has not made either error. Lynch's advocacy lies between these two errors and appropriately frames the issue for this Court's review. Lynch has not presupposed the availability of parole, unlike *Cruz*, *Dann*, *Garcia*, and *Benson*. Rather, Lynch has correctly noted that the 1994 abolition renders Lynch ineligible for parole.

Lynch has also not gone so far as to argue that the jury needed to be incorrectly instructed that no form of executive clemency was available. Instead, Lynch has argued that the availability of executive clemency is constitutionally irrelevant under *Simmons*. OB 102-05.

These factual distinctions undermine the State's argument that the cases all occurred after 1994. AB 82-83. While the cases occurred after 1994, the cases were logically flawed and this Court merely constrained its rulings.

This Court has never held that capital defendants are uniquely eligible for parole when all other felons are ineligible under A.R.S. § 41-1604.09(I). This Court has also never held that A.R.S. § 41-1604.09(I) does not apply to convictions for first degree murder. Indeed, such a holding would make little sense. *See Miller v. Alabama*, __ U.S. __, 132 S.Ct. 2455, 2473 & n.13 (2012) (Arizona is one of "29 jurisdictions mandating life without parole for children" and citing statutes for sentencing and abolition of parole); *State v. Randles*, 235 Ariz. 547, ¶ 5 (App. 2014) (before A.R.S. § 13-716, juvenile defendants convicted of first degree murder were not eligible for parole because parole had been abolished); *State v. Rosario*, 195 Ariz. 264, ¶ 26 (App. 1999) (A.R.S. § 41-1604.09(I) eliminated "the possibility of parole for crimes after" January 1, 1994). This Court has constrained its rulings to the arguments made in each appeal. If Lynch is incorrect in this position, and this Court

has intended its previous holdings to mean that A.R.S. § 41-1604.09(I) did not abolish parole, this Court should clarify this interpretation.

Finally, the State's reliance upon *Ramdass v. Angelone*, 530 U.S. 156 (2000), is misplaced. After the defendant's case, Virginia extended *Simmons* to all cases regardless of whether future dangerousness was at issue and abolished parole. *Id.* at 178. "The combination of *Yarbrough* [*v. Commonwealth*, 519 S.E.2d 602 (1999)] and the elimination of parole means that all capital defendants in Virginia now receive a *Simmons* instruction if they so desire." *Ramdass*, 530 U.S. at 178.

This favorable citation to *Yarbrough* is telling. In *Yarbrough*, the Supreme Court of Virginia dealt with whether the abolition of parole required *Simmons* instructions in capital cases. 519 S.E.2d 602, 612-13. *Yarbrough* held that a trial court, upon request, must instruct the jury that life means "life without possibility of parole." *Id.* at 374, 616. In light of the Supreme Court's favorable citation to *Yarbrough*, this Court should follow the lead of *Yarbrough*.

The State next argues Lynch was not ineligible for parole and "could have received a parole-eligible sentence, and though there may not be a currently existing parole mechanism, nothing prevents the legislature from creating a parole system in the future for which Lynch would have been eligible had the court sentenced him to life with the possibility of release after 25 years." AB 83. To the extent the State

argues A.R.S. § 41-1604.09(I) did not abolish parole, the argument is addressed above. To the extent the State argues future legislative action could solve, the State is incorrect.

"The substantive legal consequence of past events is determined by the law in effect at the time of the event ...." *State v. Murray*, 194 Ariz. 373 (1999); *accord State v. Montes*, 226 Ariz. 194, ¶ 13 (2011); *see also Ramdass v. Angelone*, 530 U.S. 156, 165 (2000) (propriety of *Simmons* instruction is determined at time of jury's deliberations). Under the law in effect when Lynch was sentenced, Lynch was not eligible for parole. The State's speculation that 1) the legislature might pass into law a parole scheme and 2) apply that scheme retroactively, is without merit. The argument is nearly identical to an argument already rejected in *Simmons*. *See Simmons*, 512 U.S. at 166 ("To the extent that the State opposes even a simple parole-ineligibility instruction because of hypothetical future developments, the argument has little force.").

The State's interpretation also unnecessarily places two statutes at conflict and leads to absurd results. The State's interpretation places A.R.S. §§ 13-703(A) (2001) and 41-1604.09(I) in conflict. The latter abolishes parole across the board even though the State asserts that the former gives rise to parole. The absurdity is seen by the unavailability for any actual parole mechanism. To this extent, any parole

availability was, and currently is, illusory. Because parole has been abolished, Lynch is not eligible for release unless granted clemency. *See Graham v. Florida*, 560 U.S. 48 (2010) ("Because Florida has abolished its parole system ... a life sentence gives a defendant no possibility of release unless he is granted executive clemency.").

5. The availability of executive clemency does not alter the requirements of *Simmons*.

The State argues that because the defendant in *Simmons* was specifically ineligible for parole, Lynch's attempts to distinguish between parole and executive clemency is unavailing. AB 83. Lynch is not eligible for parole because he must be sentenced in light of A.R.S. § 41-1604.09(I). Lynch is merely eligible for executive clemency after 25 years. There is a constitutional difference between clemency and parole. Clemency is the rare *ad hoc* exercise of a governor whereas parole is "an established variation on imprisonment of convicted criminals." *Solem v. Helm*, 463 U.S. 277, 300-01 (1983). The Supreme Court expressly rejected clemency as a justification to refuse instruction in *Simmons*. 512 U.S. at 166 & fn.6. The distinction is important, though, in light of the arguments advanced in *Hargrave*, *Chappel*, *Hardy*, and *Boyston*. While this Court correctly disposed of the claims in light of the arguments, this Court was not faced with the constitutional inadequacy of clemency.

This Court has never held that these alternative forms of release warrant denial of a *Simmons* instruction. Such a holding would contravene *Simmons*.

6. The instructions did not remedy the error.

The State misconstrues this argument as an attack on the propriety of the instruction. AB 84. The instruction tracked the language of the statute. However, that is precisely why the instruction compounded the error. Because the instruction, reflecting statutory language, includes reference to release on parole, the instruction communicates that parole is available. A juror who reads such an instruction would believe Lynch was eligible for parole. As discussed above, though, Lynch could not have been released on parole. Thus, the juror would have been left with an incorrect impression regarding the ramifications of a possible non-death sentence.

The State also argues that any such error was harmless because the jury knew Lynch would serve 46 years in prison before he was eligible for parole. AB 83-84. The State relies upon *State v. Garcia*, 224 Ariz. 1, ¶ 78 (2010) to support its claim. The State's argument suffers from the same logical error made by the attorneys in *Garcia*: the argument presupposes parole eligibility. *See id.* at ¶ 74. Although Lynch was not eligible for parole, the jury was told, in effect, Lynch was eligible for parole. The attorneys indicated, "the likelihood that he'll ever be released is just unimaginable" and that Lynch would likely "die in prison one way or the other."

RT 8/9/2012, 45-46, 99-100. However, the defense was not allowed to make the legally correct argument that Lynch would never be eligible for parole. It is also important that this argument was presented in the context of Lynch's medical condition. But Lynch's medical condition, particularly Lynch's life expectancy, was disputed by the State. *See generally* testimony of Dr. Honan, RT 7/26/2012, 92-143; RT 8/9/2012, 75-77. Indeed, during closing arguments the State argued, "We don't even know if he's terminal. And according to Dr. Honan, he's not." RT 8/9/2012, 77 That the defense made an argument regarding life expectancy does not render the error harmless when life expectancy was a hotly disputed point of contention. *See Yarbrough v. Com.*, 519 S.E.2d 602, 616-17 (Va. 1999) (defense counsel argument that defendant would spend a long time in prison did not render failure to instruct harmless).

Conclusion:

For the reasons stated in the Opening Brief and herein, the trial court erred when it denied Lynch's request for a *Simmons* instruction. The error resulted in the incorrect impression that parole was available. Accordingly, this Court should vacate the sentence and remand for resentencing.

ARGUMENT 4

LYNCH WAS DEPRIVED OF HIS RIGHT TO A PROPERLY CONSTITUTED JURY WHEN THE TRIAL COURT FAILED TO ACCURATELY FOLLOW THE PROCEDURE SET FORTH IN *BATSON V. KENTUCKY*. AS A RESULT OF THE TRIAL COURT'S FAILURE, THE STATE WAS PERMITTED TO STRIKE TWO JURORS WITHOUT PROVIDING SATISFACTORY RACE-NEUTRAL REASONS FOR THE STRIKES.

Lynch argued, in the Opening Brief, that the trial court improperly refused to follow the process for evaluating peremptory strikes set forth in *Batson v. Kentucky*, 476 U.S. 79 (1986). Lynch relies upon the Standard of Review and Statement of the Facts offered in the Opening Brief. Lynch asks this Court to vacate the sentence and remand for a new sentencing procedure where the mandates of *Batson* will be appropriately followed.

Discussion:

The State's base response illustrates the trial court's error. The State argued, "The trial court did not clearly err because the prosecutor offered race-neutral explanations for the strikes and Lynch offered no evidence to prove the prosecutor's explanation was a pretext for discrimination." AB 85. This is precisely the point: the trial court never gave Lynch an opportunity to discuss pretextuality because the trial court refused to conduct the third step of the *Batson* analysis. As the State points out,

"the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *State v. Garcia*, 224 Ariz. 1, ¶ 21 (2010) (quoted at AB 87). To carry the burden, Lynch, must be given an opportunity to argue that race-neutral reasons were pretextual. This is why a third step to the *Batson* analysis exists.

The State relies upon *State v. Newell*, 212 Ariz. 389 (2006) to argue that the failure to conduct the third step of a *Batson* analysis is not necessarily error. AB 88. The State misreads *Newell*. Evaluating the reason for the strike (the second step), this Court discussed the individual *voir dire* of the excused juror, during which the prosecutor asked questions, the defense asked questions, and the prosecutor asked follow-up questions. *Newell*, 212 Ariz. 389, ¶ 55. The trial court also asked the juror a number of questions. *Id.* at ¶ 56. The prosecutor struck the juror because of inconsistent answers regarding the juror's ability to impose the death penalty. *Id.* at ¶ 55.

The State argues, "Then, with no discussion of whether the trial court conducted *Batson*'s third step, this Court concluded that the strike did not violate *Batson*, noting that the defendant offered no evidence, other than inference, that the strike resulted from purposeful discrimination." AB 88. However, considering the reason for strike,

this Court's discussion in paragraphs 55-56 incorporated *Batson*'s third prong. There was no need to repeat the evaluation.

Moreover, *Newell* and this case involve very different justifications. In *Newell*, the prosecutor excused the juror because of "contradictory responses about whether she could vote to impose the death penalty ...." *Newell*, 212 Ariz. 389, ¶ 58. This is a plausible and persuasive reason for strike. *See Snyder v. Louisiana*, 552 U.S. 472, 477 (2008); *Purkett v. Elem*, 514 U.S. 765, 767-68 (1995). Thus, this Court did not need to unnecessarily draw out its discussion. Here, though, the prosecutor struck juror 34 because juror 34 had tattoos and struck juror 32 because juror 32 had a beard and ponytail. RT 7/17/2012, 12-14.

The State's reliance on *State v. Bailey*, 160 Ariz. 277, 281 (1989), is similarly misplaced. In *Bailey*, the prosecutor explained the strike was because of the juror's criminal history and personal request to be excused for job conflicts. *Id.* To whatever extent this Court did not discuss the third prong of *Batson* in *Newell* or *Bailey*, it is because the reason offered in both of those cases was inherently credible and case-related.

The State's comparison to *State v. Canez*, 202 Ariz. 133 (2002), is also unpersuasive. *See* AB 88-89. In *Canez*, it appears the defendant was given an opportunity to raise third prong arguments before the trial court. *Canez*, 202 Ariz. 133

at ¶ 17 ("Canez argued that nothing in the record supported the alleged spotty employment history of that Perea knew of it."), ¶ 18 ("Canez argued that this reason was pretextual since the State had not asked follow-up questions to clarify her employment."), ¶ 19 ("Canez points out that nothing on the record supports the claimed hostility and that the other jurors with relatives who had brushes with the law were not struck."), ¶ 20 ("Canez points out that Salazar stated that he could set aside his feelings about the death penalty and be a fair and impartial juror."), ¶ 21 ("Canez points out that the juror said he could be fair and impartial and that no co-defendants testified against Armenta in his own conviction."). In light of this record, this Court's use of the phrase "implicitly finding" was not meant to imply that the third step had not been conducted. *See Id.* at ¶ 28. Rather, the case indicates that after the third step, the trial court merely ruled on the challenge and did not make explicit findings regarding pretextuality. *See Id.* This is supported by the discussion of the trial court's commentary on some of the excused jurors. *See Id.* at ¶ 17 ("This strike gave the trial judge some pause since he did not share the State's concerns."), ¶ 18 ("Although the trial court believed she would be a good juror, it upheld the strike as race-neutral."). Finally, the race-neutral reasons in *Canez* were akin to the reasons offered in *Newell* and *Bailey*. *See Id.* at ¶ 17 (criminal history), ¶ 18 (inconsistent, possibly deceptive, answers regarding education and employment), ¶ 19 (hostility towards prosecutor's

office), ¶ 20 (criminal history and dislike for death penalty), ¶ 21 (criminal history and attitude towards testimonial agreements).

The case here is very different from *Newell*, *Bailey*, and *Canez*. Here, the trial court's determination that the proffered reason was race-neutral was only the second step of the *Batson* analysis and the court never engaged in the third step. That this Court did not, in these three cases, expressly walk through a separate evaluation of the *Batson*'s third step does not mean the third step was not followed. Rather, the third step in *Newell*, *Bailey*, and *Canez* was considered at an earlier point and not repeated. Moreover, the reasons offered in *Newell*, *Bailey*, and *Canez* each attached to commonly accepted reasons for strikes such as criminal history, attitudes toward the death penalty or pieces of evidence, and believed deception. The reasons were not facially implausible, fantastic, or unpersuasive. Here, the prosecutor struck jurors 32 and 34 because of tattoos and grooming. These answers, while race-neutral, do not warrant the same esteem as reasons such as criminal history and lenient attitudes towards the death penalty.

The State's final argument fails to understand the *Batson* process. The State argues, "Lynch offered no evidence that the strikes were the result of purposeful discrimination." AB 90. This argument is disposed of by a case the State relies upon

in its own briefing just two pages earlier, *State v. Newell*, 212 Ariz. 389 (2006) (cited at AB 88). In *Newell*, this Court wrote:

> The first step of the *Batson* analysis is complete when the trial court requests an explanation for the peremptory strike. Here, the trial court made that request of the prosecutor; therefore, the burden shifted to the prosecutor to give a race-neutral basis for the peremptory strike.

Newell, 212 Ariz. 389, ¶ 54. The State is correct that the prosecutor did not use all ten strikes against minority panelists and other minorities, even Hispanics, may have remained on the jury. AB 90. However, this is irrelevant because Lynch satisfied the burden to make a *prima facie* showing the moment the trial court shifted the burden to the State. *See Newell*, 212 Ariz. 389, ¶ 54; RT 7/17/2012, 10.

The State also complains, "Nor did defense counsel assert that the prosecutor failed to strike similarly situated, non-minority jurors" and "offered nothing to rebut the prosecutor's statements that no other juror had as many visible tattoos as Juror 34 ..." AB 90. The State ignores the process again. "To pass step two, the explanation need not be 'persuasive, or even plausible.'" *Newell*, 212 Ariz. 389, ¶ 54. Rather, the persuasiveness of the justification becomes relevant at the third step. *Id.* "In determining whether the defendant has proven purposeful discrimination, 'implausible or fantastic justifications may (and probably will) be found to be pretextual.'" *Id.*

It would not have been until the third step that Lynch would have been able to discuss similarly situated jurors or rebut statements regarding visible tattoos. Indeed, the defense attorneys would not have even known the reasons for the strikes until the second step was completed. This is why the third step is so important. The State now attempts to use Lynch's inability to dispute the prosecutor's reasons as a justification for this Court to deny Lynch's arguments. But Lynch was never even given the opportunity to dispute the prosecutor's reasons because the trial court did not conduct the third step. Instead, the trial court believed that the offering of a race-neutral reason —any race-neutral reason without regard to its plausibility or persuasiveness— satisfied *Batson*. This ruling was incorrect.

Conclusion:

The trial court incorrectly ruled that *Batson* was satisfied by the mere proposal of a race-neutral reason without regard to plausibility or persuasiveness. As such, the trial court's ruling was "induced by an erroneous view of the law," and therefore clear error. *See Merryweather v. Pendleton*, 91 Ariz. 334, 339 (1962).

ARGUMENT 5

THE TRIAL COURT INCORRECTLY DENIED LYNCH'S MOTION TO STRIKE JUROR 5 WHEN JUROR 5 POSSESSED PERSONAL KNOWLEDGE FROM OUTSIDE THE RECORD REGARDING THE EXPERIENCE AND REPUTATION OF AN EXPERT WITNESS.

Standard of Review:

While the appropriate standard of review was set forth in the Opening Brief, one issue must be addressed. The State has argued that this Court should review the discussion regarding A.R.S. § 21-211(2) for fundamental error because "he did not raise this argument below." AB 96. In essence, the State argues that Lynch has waived the analysis because Lynch did not expressly cite to A.R.S. § 21-211(2). However, this is not required. Issues are preserved for appeal even when the issue is raised only minimally at the trial court level. *Town of Marana v. Pima County*, 230 Ariz. 142, ¶ 30 (App. 2012) (finding issue was preserved where County raised a claim "minimally" in its supplemental brief); *e.g. State v. Williams*, 220 Ariz. 331, ¶ 11 fn.4 (App. 2008) (finding sentencing issue preserved when defendant minimally raised issue in sentencing memorandum). Framed in the context of an objection, "[a]n objection is sufficiently made if it provides the judge with an opportunity to provide a remedy." *State v. Fulminante*, 193 Ariz. 485, ¶ 64 (1999). The purpose behind fundamental error is "to discourage a defendant from taking his chances on a

favorable verdict, reserving the 'hole card' of a later appeal on a matter that was curable at trial, and then seeking appellate reversal." *State v. Henderson*, 210 Ariz. 561, ¶ 19 (2005) (internal quotation marks and modifications omitted).

Here, Lynch satisfied the "minimally raised" requirement when Lynch expressly asked the trial court to excuse the juror. A party need not cite to every possible statute or rule that might apply to ensure preservation. "[T]he trial court is presumed to know and follow the law." *State v. Ramirez*, 178 Ariz. 116, 128 (1994). Section 21-211(2) applied to this scenario, Lynch appropriately raised the issue and asked the trial court to dismiss the juror, and the trial court is presumed to have known and followed A.R.S. § 21-211(2). To this extent, Lynch did not reserve a hole card; the trial court had an opportunity to provide a remedy. All claims were appropriately preserved.

Discussion:

The State's argument focuses largely upon motions to strike for cause made immediately after *voir dire*. This, however, ignores the context of the present case, and the dualistic purpose of the *voir dire* process. "The purpose of jury *voir dire* examination is to unveil a juror's prejudice so that the parties can exercise intelligently their peremptory challenges and challenges for cause." *State v.*

McDaniel, 136 Ariz. 188, 192-93 (1983) (abrogated on other grounds by *State v. Walton*, 159 Ariz. 571 (1989)).

However, all peremptory challenges must be made before the jury is sworn and the failure to exercise a peremptory challenge constitutes a waiver of the challenge. Ariz.R.Crim.P 18.5(g). Put simply, Lynch could not retain a peremptory strike going into the trial just in case something like this happened.

The flaw in the State's reasoning is contextual. The State has focused its analysis on how this Court should treat a motion to strike a juror for cause when the motion is brought pursuant to Rules 18.4 and 18.5, Ariz.R.Crim.P However, if the trial court denies any such motion, the losing party still has recourse through a peremptory challenge.

This case is analytically distinct. Here, the juror did not reveal the connection before strikes could be exercised. This missing information left Lynch without recourse. Lynch likely would have moved to strike Juror 5 for cause on the basis of the relationship with the expert. The trial court could have reached the same decision here. However, Lynch then would have had the opportunity to exercise a peremptory strike. If Lynch had chosen not to exercise the strike, Lynch risked impartiality and possibly invited error. If Lynch had chosen to strike the juror, any error would have been harmless. The availability of a peremptory challenge is precisely why a trial

court's decisions can be viewed with such deference. Lynch was not able, though, to exercise a peremptory strike in this case.

Thus, the bulk of the State's authority is inapposite. *E.g. State v. Hoskins*, 199 Ariz. 127, ¶ 36 (2000) (noting defendant used peremptory strikes); *State v. Comer*, 165 Ariz. 413, 423 (1990) (same); *State v. Medina*, 193 Ariz. 504, ¶ 17 (1999) (same); *State v. Eddington*, 228 Ariz. 361, ¶ 3 (2011) (same).

The only case cited by the State that even discussed an analogous procedural posture was *State v. Bible*, 175 Ariz. 549 (1993). In *Bible*, this Court reviewed a motion to strike a juror after empanelment as a motion to strike for cause under Rule 18.4(b), Ariz.R.Crim.P *Id.* at 574-75. While this Court affirmed the trial court's ruling, this Court noted, "it would have been better to have selected the juror as an alternate ...." *Id.* at 575.

Bible, though, did not outline how 18.4(b) should be evaluated after jurors were empanelled. Such a distinction is important. The Florida Supreme Court adopted the following test:

> In determining whether a juror's nondisclosure of information during voir dire warrants a new trial, courts have generally utilized a three-part test. First, the complaining party must establish that the information is relevant and material to jury service in the case. Second, that the juror concealed the information during questioning.

> Lastly, that the failure to disclose the information was not attributable to the complaining party's lack of diligence.

De La Rosa v. Zequeira, 659 So.2d 239, 241 (Fla. 1995). The second prong is satisfied with the mere omission of information; a juror need not intentionally mislead the attorneys. *Id.* at 242. Regardless of the juror's intention, an "omission nonetheless prevented counsel from making an informed judgment—which would in all likelihood have resulted in a peremptory challenge." *Id.*

This test appropriately balances competing interests and recognizes the procedural difference between strikes before and after empanelment. The test does not tolerate invited error and does not extend to irrelevant information but appropriately acknowledges the lack of any recourse through a peremptory challenge.

The Florida Court of Appeals applied this test to the context of a juror's knowledge regarding forensic science in *Dery v. State*, 68 So.3d 252 (Fla.App. 2010). During *voir dire* the State asked if anyone had specific knowledge about DNA and the juror did not respond. *Id.* at 254. After the primary detective testified, the juror "indicated that she recognized the witness." *Id.* The court interviewed the juror and learned she had taken a forensic science course. *Id.* The lead detective had taught the course. *Id.* The defendant merely asked that the juror be replaced by an alternate. *Id.*

The trial court refused. *Id.* Focusing largely upon the knowledge of forensic science, the Court of Appeals found the trial court had abused its discretion. *Id.* at 255.

This provides an interesting juxtaposition against *Bible*, which provides:

> In deciding whether a juror may continue to sit in this situation, the court must consider the relationship between the witness and the juror, whether the juror will properly assess the testimony, the importance of the testimony, and whether the testimony is disputed.

Bible, 175 Ariz. at 574. There, the juror knew a witness who gave unrebutted testimony. This is certainly a consideration about the materiality of the information. The juror in *Bible* did not have any information that was truly material in the case. Moreover, the defense attorney believed the juror had disclosed the possible conflict in the questionnaire. *Id.* While this Court determined the juror had not made such a disclosure, the ambiguity certainly indicates the failure to disclose was at least partially attributable to the defense attorneys. While this Court did not establish a test in *Bible*, this Court's evaluation reflects the test used in *De La Rosa*.

Here, each prong is satisfied. First, Juror 5's knowledge of Dr. Honan and impression of Dr. Honan's reputation is both "relevant and material to jury service" in Lynch's case. Unlike *Bible*, the prosecution called Dr. Honan to contest the testimony of defense expert Dr. Altschuler. The content of the testimony went to a mitigating factor, Lynch's health and life expectancy. Indeed, the State has conceded the issue

"was significant and went to a contested issue." AB 95. Second, the information was concealed. The lack of an intentional concealment is irrelevant. The information was omitted. The information certainly would have been pertinent to a peremptory challenge. Third, the omission was not due to Lynch's lack of diligence. The trial court read the list of witness names and Juror 5 did not affirmatively respond. Given the lack of a response, there was no reason to follow up.

The State has placed heavy reliance upon the Juror's answers that she could be fair and impartial. The test articulated in *De La Rosa*, and inherently applied in *Bible*, considers that jurors often cannot adequately assess their fairness. The United States Supreme Court has noted, "jurors will not necessarily be fully conscious of the effect [issues] will have on their attitude toward the accused...." *Holbrook v. Flynn*, 475 U.S. 560, 570 (1986). Thus, "the question must be not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether an unacceptable risk is presented of impermissible factors coming into play." *Id.* The Supreme Court also observed, "No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but psychological impact requiring such a declaration before one's fellows is often its father." *Irvin v. Dowd*, 366 U.S. 717, 728 (1961).

Juror 5 likely believed she could be fair and impartial. But the prejudicial impact is often unconscious and unknown to the jurors themselves. While such reliance upon a juror's statements can be grounds to affirm a trial court's rulings when the parties can still exercise peremptory strikes, the balance must tip when information is disclosed only after the jury has been empanelled.

Two additional arguments must be briefly addressed. First, the State argues that Juror 5's knowledge added little to Dr. Honan's testimony regarding his own credentials. AB 98. While degree may be a matter of perspective depending upon the adversarial position of a party, the State has not disputed the base concern: the juror possessed additional knowledge. This additional knowledge, regardless of the degree assigned, could have had an impact upon credibility assessments.

The State's argument on the propriety of the instructions is also unavailing. The State merely repeats the instructions to argue they sufficiently addressed any concern. The State attempts to respond to the evaluation in the Opening Brief with two sentences. AB 99. Both sentences failed to actually evaluate the argument developed in the Opening Brief and merely asserted conclusions. To this extent, the arguments are nonresponsive.

ARGUMENT 6

MITIGATION IS SUFFICIENTLY SUBSTANTIAL TO CALL FOR LENIENCY.

Shawn Lynch is dying. RT, 7/23/12, 147 He is dying of Hepatitis C and he already suffers from the painful and grotesque symptoms of this disease – a bacterial infection in his legs that causes the skin on his legs to stretch and break open and to seep fluids, encephalopathy, pancytopenia, and esophageal varicose veins. *Id.* 84-94. Dr. Atlschuler noted that a hospital report that he viewed diagnosed Lynch as having "end-stage liver disease." *Id.* 93. In his report, the State's expert, Honan, admitted that Lynch suffered from "significant chronic liver disease." RT, 7/26/12, 122.

End-stage hepatitis C means the liver has been severely damaged by the hepatitis C virus. The hepatitis C virus slowly damages the liver over many years, often progressing from inflammation to scarring (fibrosis) to permanent, irreversible scarring (cirrhosis). A majority of infected people don't even realize the damage has occurred.

Once you have cirrhosis, the liver is unable to heal itself. Treatment just tries to keep damage from worsening. (Although, in rare cases, cirrhosis can be reversed.) Symptoms of serious end-stage liver disease can begin to appear:

- Fatigue
- Persistent or recurring yellowing of your skin and eyes (jaundice)

- Loss of appetite
- Nausea
- Abdominal swelling due to fluid accumulation (ascites)
- Disturbances of thinking

In some cases, the cirrhosis leads to liver cancer. More often, your liver continues to deteriorate to the point where the liver loses most or all of its function — liver failure. In addition, people with cirrhosis may also develop:

- Gastrointestinal bleeding due to enlarged veins in the esophagus (esophageal varices)
- Brain and nervous system damage due to the accumulation of toxins in the bloodstream (hepatic encephalopathy)
- The only effective treatment for people with end-stage liver disease is a liver transplant. Chronic hepatitic C virus is the most frequent cause of liver transplantation in the United States. Most people who receive a liver transplant for hepatitis C survive for at least five years after their transplant, but almost always, the hepatitis C virus returns.

http://www.mayoclinic.org/diseases-conditions/hepatitis-c/expert-answers/hepatitis-c/FAQ-20058533

As noted, there is a treatment for Hepatitis C that does not involve drugs – it is a liver transplant. *Id.* Honan agreed that a liver transplant was the treatment for someone in Lynch's stage of liver disease. RT, 7/26/12, 112. Most of these symptoms are the same symptoms as Altschuler described Lynch is experiencing. As Altschuler also said, the Arizona Department of Corrections made a determination not to treat inmates that were inflicted with Hepatitis C simply because of budgetary

reasons. RT, 7/23/12, 55-58. The Department of Corrections is quite simply leaving Lynch to die by painful inch in his solitary cell on death row. This constitutes cruel and unusual punishment and violates Lynch's 8th Amendment rights and is inflicting unnecessary pain and suffering beyond that which is constitutionally permissible.

In its Answering Brief, the State claims that its expert, Honan "estimated that Lynch had 'statistically about an 80 percent survival of five years." RT 7/26/12, AB, 107 What the State left out of its facts was that Honan qualified his remark by saying that his "take on this was statistically about an 80 percent survival of five years based on the literature." RT 7/26/12, 109. What the State also left out was Honan's comment that he did not believe that Lynch was "in a class where he is expected to die very shortly. *Id.* Honan said that he expected Lynch to have a "shorter life expectancy." *Id.* Additionally, Honan based his conclusions on records that he reviewed that were dated October 9, 2009 and 2010. *Id.* 108, 132. He had never personally examined Lynch. The State's argument that this mitigating factor is entitled to "little, if any mitigating weight" is meritless. Both experts agreed that Lynch had liver disease, both agreed that he was not being treated for it, that he had symptoms related to the liver disease and that he would not have a normal life expectancy. In *State v. Patton*, 120 Ariz. 386, 389 (1978), this Court determined that a defendant's physical condition is a mitigating factor.

In its Answering Brief on this issue, the State argues that Lynch's mitigating factors should be entitled to little or no weight because Lynch was "unable to connect any of his proffered mitigation to the murder." AB, 113. The State is urging an "impermissible requirement of a causal nexus between mitigating evidence and the crime." *Lopez v. Ryan,* 630 F.3d 1198, 1203 (9th Cir. 2011). This Court has said: "We do not require that a nexus between the mitigating factors and the crime be established before we consider the mitigation evidence. *See Tennard v. Dretke,* 542 U.S. 274, 287 ...." *State v. Newell,*212 Ariz. 389, 405 (2006). When independently determining if there is mitigation sufficiently substantial to call for leniency, this Court should reject the State's claims requiring a causal nexus.

In its Answering Brief, the State did not contest Lynch's assertion that, during its independent review, this Court must look at the entire record, including the record related to this Court's previous review of this case in *State v. Lynch,* 225 Ariz. 27 (2010). As such, the State has waived any objection.

Based on its independent review, this Court should determine that there is mitigation sufficiently substantial to warrant leniency and vacate Lynch's death sentence.

ARGUMENT 7

ARIZONA DEATH PENALTY IS UNCONSTITUTIONAL.

Appellant relies upon the argument in the Opening Brief.

ARGUMENT 8

ARIZONA DEATH PENALTY IS UNCONSTITUTIONAL BECAUSE THE EXECUTION INVOLVES TORTURE AND A LINGERING DEATH.

The State offers two conclusory assertions against Lynch's final claim. Both arguments fail in light of the concerns raised in the Motion to Supplement the Opening Brief.

First, the State argues the materials relied upon by Lynch should not be considered because they are media reports and not part of the record on appeal. The State ignores timing. The botched Wood execution did not occur until after the Opening Brief was filed. It would have been impossible for Lynch to include the appropriate documents during trial because Wood had not yet been executed. Moreover, the consideration of media reports is nothing but the consideration of an authority source. This Court has relied upon media reports when appropriate. *E.g. Roosevelt Elementary School Dist. No. 66 v. Bishop*, 179 Ariz. 233, 242-43 n.8 & 9 (1994) (citing *The Arizona Republic* articles); *State ex rel. Ekstrom v. Justice Court of State of Ariz. In and For Kingman Precinct No. 1*, 136 Ariz. 1, 6 (1983) (J. Feldman concurring) (citing article printed in *Chicago Tribune* and reprinted in *The Arizona Republic*).

The State's second argument is that the present argument is premature. AB 114. Upon first blush, such an argument would appear persuasive, as this Court has previously noted that arguments regarding protocol can be raised in a Rule 32 Petition. *See State v. Andriano*, 215 Ariz. 497, ¶ 62 n.9 (2007) (abrogated on other grounds by *State v. Ferrero*, 229 Ariz. 239, ¶ 20 (2012)). However, this ignores two factors which are ripe for the present case.

First, this Court should condition the constitutionality of execution by lethal injection upon the invalidity of the drug cocktail midazolam and hydromorphone. In *Andriano*, this Court's authorization of execution by lethal injection "was not conditioned upon the use of particular procedures in implementing lethal injection." 215 Ariz. 497, ¶ 62. Because of the torturous results repeatedly experienced in executions using the combination of midazolam and hydromorphone, execution by this process should be deemed unconstitutional.

Second, this Court should condition the constitutionality of execution by lethal injection upon the transparency of the Department of Corrections. A Rule 32 guarantee to challenge the protocol is meaningless when the Director of the Department of Corrections (an individual who is not a medical professional) can change execution protocols on short notice, hide the source of execution drugs, or prevent attorney observation of execution preparation.

If the Court does not condition the constitutionality of executions by lethal injections upon these two factors, execution by lethal injection becomes untenably cruel. It is already difficult for a person to await execution. Refusal to condition constitutionality means that criminal defendants are left awaiting execution with legitimate reason to believe they are awaiting torture. Regardless of the constitutionality of the protocol actually used, the impact this will have on all persons awaiting execution is unduly cruel.

Short of conditioning constitutionality upon these issues, this Court should declare the death penalty, as currently implemented, unconstitutional.

CONCLUSION

Based on the issues presented, this Court should vacate Appellant's death sentences and impose a life sentence.

Respectfully submitted,

MARICOPA COUNTY PUBLIC DEFENDER

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APPENDIX – E –

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SUPREME COURT OF ARIZONA

STATE OF ARIZONA Appellee, v. **SHAWN PATRICK LYNCH,** Appellant.	No. CR 12-0359-AP Maricopa County Superior Court No. CR2001-092032 A **MOTION FOR RECONSIDERATION**

Shawn Lynch asks this Court to Reconsider its Opinion issued September 10, 2015, pursuant to Rule 31.18, Ariz.R.Crim.P Reconsideration is appropriate on four issues: prosecutorial misconduct, scope of remand, *Simmons* instruction, and refusal to strike Juror 5. This motion is accompanied by the following Memorandum.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Prosecutorial Misconduct.

The prosecutor, Juan Martinez, committed misconduct or struggled with the boundaries of appropriate advocacy in several ways and on several occasions through every stage of Shawn's trial. The following chart quickly summarizes the instances of misconduct found by this Court:

Category of Misconduct	Instances	Phase	Opinion citation
Argument During Opening	Two instances of misconduct: 1. Lynch's childhood should not be considered a mitigating circumstance. 2. Defense wanted to "pull at [the jury's] heart strings."	Opening Statements	¶ 8
Improper witness examination	Eight instances of misconduct: 1. Two instances of asked and answered. 2. Two instances of interrupting witnesses. 3. Comment to expert to "just answer my question for once." 4. Additional argumentative questions. The opening brief listed three additional questions to which the trial court sustained objections on argument grounds.	Witness Examination	¶ 11
Questions regarding the veracity of other witnesses	One instance of misconduct: 1. Martinez's remark that Brams "can vouch for people" improper.	Witness Examination	¶ 15.

Category of Misconduct	Instances	Phase	Opinion citation
Attacks on defense experts	No additional instances of misconduct: 1. "The trial court sustained Lynch's objections to many of the questions, and the court's instructions to disregard the statements cured any possible prejudice." 2. Instances repeated from improper witness examination category	Witness Examination	¶ 22 ¶ 19
Misstating the evidence	Three instances of misconduct: 1. Refusal to admit recording because of misstatement. 2. Mischaracterizing Dr. Brams' testimony in Martinez case. 3. Mischaracterizing impact of renting pornographic movies.	Presentation of Evidence Witness Examination Closing Argument	¶¶ 25-26
Vouching	One instance of misconduct: 1. "[P]rosecutor put the prestige of the government behind his evidence by saying that 'the State does not agree.'"	Closing Argument	¶ 32
Misstating law	At least one additional instances of misconduct: 1. "The prosecutor struggled … during voir dire and closing argument with the disjunctive 'or' and conjunctive 'and' in explaining the (F)(6) aggravator …." 2. "Prosecutor misstated the law by arguing that Lynch's renting pornographic videos 'shows a debasement in the part of [Lynch's] character." Objection was correctly sustained. Also	Closing Argument Voir Dire Closing Argument	¶ 43 ¶ 37

Category of Misconduct	Instances	Phase	Opinion citation
	addressed in misstating evidence section.		
Improper Personalization	One instance of misconduct: 1. "The prosecutor's first comment [about imagining a person approach with a knife] was improper."	Opening Statement	¶ 49

In total, this Court found at least seventeen instances of misconduct and eight different categories of misconduct. The misconduct spanned over every stage of the penalty phase retrial: voir dire, opening statements, presentation of evidence, examination of witnesses, and closing arguments.

Additionally, this Court noted four borderline instances where questions were aggressive and an objection on argumentative grounds could have been sustained. Opinion ¶¶ 12 (three questions were "aggressive, and the court would have been well within its discretion to have sustained the objections" but failure did not deny Shawn a fair trial), 23-24 (cross-examination regarding risk that Shawn would "stick or prick" someone "was argumentative").

In denying Shawn's argument that he was deprived of a fair trial by prosecutorial misconduct, this Court made two errors. First, this Court has rendered cumulative error meaningless. Second, this Court has incentivized prosecutorial misconduct through its failure to take any corrective steps.

1. Cumulative error is meaningless.

In *Hughes*, this Court recognized cumulative error as a component of its consideration of whether prosecutorial misconduct permeates the atmosphere of a trial. *State v. Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d 1184, ¶ 26 (1998). Instances that were not error or were harmless can also contribute to a finding of pervasive misconduct "if the cumulative effect of the incidents shows that the prosecutor intentionally engaged in improper conduct and 'did so with indifference, if not a specific intent, to prejudice the defendant.'" *State v. Roque*, 213 Ariz. 193, ¶ 155, 141 P.3d 368, ¶ 155 (2006) (quoting *Hughes*, 193 Ariz. 72, ¶ 31, 969 P.2d 1184, ¶ 31).

First, with nearly twenty instances of misconduct occurring over every stage of the proceedings, the misconduct was pervasive and permeated the atmosphere of the trial. Indeed, in *Hughes*, the misconduct occurred largely during just the cross-examination of an expert witness and rebuttal argument. 193 Ariz. 72, ¶ 34, 969 P.2d 1184, ¶ 34.

Second, when a prosecutor has been admonished that certain conduct is improper, as Martinez has, it is hard to understand how repetition of that very misconduct is anything but intentional. Where the prelude to misconduct in *Hughes* was the defense attorney's request for the trial court to pay special attention to the rebuttal argument, the prelude to Juan Martinez's misconduct arose in this Court's published opinions. *See State v. Gallardo*, 225 Ariz. 560, ¶ 44, 242 P.3d 159, ¶ 44

(2010); *State v. Morris*, 215 Ariz. 324, ¶ 58, 160 P.3d 203, ¶ 58 (2007). *Gallardo* and *Morris* admonished Martinez not to engage in at least two of the categories of misconduct repeated in this case. Prosecutors hold a special role as a "minister of justice" with the duty to ensure trials are fair. *Hughes*, 193 Ariz. 72, ¶ 33, 969 P.2d 1184, ¶ 33. Prosecutors should not try to win at all costs.

However, with this Court's opinion, there is no guidance as to what constitutes cumulative error and what doesn't. This was not a case with an isolated instance of misconduct. This case was not even confined to a handful of instances. This Court found more instances of misconduct in this case than were noted in either *Hughes* or *Pool*. *See Hughes*, 193 Ariz. 72, ¶¶ 35, 42-45, 48-56, 969 P.2d 1184, ¶¶ 35, 42-45, 48-56 (listing approximately fourteen instances of misconduct through cross-examination and rebuttal argument); *Pool v. Superior Court*, 139 Ariz. 98, 109-11, 677 P.2d 261, 272-74 (Appendix listing approximately 8 instances of more serious improprieties and 6 additional instances of sustained objections, all occurring during cross-examination of the defendant). If cumulative error does not exist in this case, cumulative error is rendered meaningless.

2. This Court has incentivized prosecutorial misconduct and created a system under which no negative repercussions come from misconduct.

Under this opinion, there is no reason not to engage in egregious prosecutorial misconduct. If the defendant objects and the trial court sustain the objection, swaths of misconduct can be "cured" by the standard instructions to ignore questions to

which objections were sustained or that statements of attorneys were not evidence. If the defendant does not object, any misconduct is reviewed for fundamental error anyhow. Thus, the only risk to any conviction obtained by egregious misconduct is a trial judge who does not understand or correctly apply the law. But because trial courts are presumed to know and correctly apply the law, such a risk is minimal. *See State v. Moody*, 208 Ariz. 424, ¶ 48, 94 P.3d 1119, ¶ 48 (2004).

Such a scheme renders prosecutorial misconduct a win-win scenario for prosecutors. The incentive to commit misconduct can be seen in Juan Martinez's history

This Court found Juan Martinez "disturbingly made a number of inappropriate comments, prompting valid objections by Lynch that the trial court sustained." Opinion ¶ 52. This Court has been "disturbed" by Martinez's misconduct for nearly a decade. But this Court has done nothing to address his ongoing and disturbing misconduct.

In *Morris*, this Court found Juan Martinez improperly encouraged the jurors to place themselves in the shoes of the victim. *State v. Morris*, 215 Ariz. 324, ¶ 58, 160 P.3d 203, ¶ 58 (2007). No other instance of misconduct was found. *See id.* at ¶ 67

In *Gallardo*, this Court found Juan Martinez improperly referenced witness fees. *State v. Gallardo*, 225 Ariz. 560, ¶ 44, 242 P.3d 159, ¶ 44 (2010). This Court also presumed two other instances of misconduct: a reference to Gallardo's childhood

and intelligence, *id.* at ¶ 40; a comparison of the victim and defendant, *id.* at ¶ 42. During oral argument, however, this Court expressly recognized it was disturbed by the misconduct and identified Juan Martinez as the prosecutor. At 29:10 into the oral argument, Justice Hurwitz opened the discussion of prosecutorial misconduct by asking the State, "Short of reversing a conviction, how is it that we can stop inappropriate conduct?" The State offered that finding the conduct improper in the opinion would be taken seriously.

Justice Ryan noted, "Well this prosecutor I recollect from several cases. This same prosecutor has been accused of fairly serious misconduct. But ultimately we decided it did not rise to the level of requiring reversal." Gallardo Oral Arg. 30:55. Justice Ryan specifically noted, "There's something about this prosecutor, and, I'll—Mr. Martinez." The attorney general was not, however, in a position to discuss the previous cases involving Juan Martinez.

Shortly thereafter, Justice Hurwitz expressly asked about the topic that was present in *Morris*, *Gallardo*, and the present case: "What about the argument about comparing the defendant to the victim? I think we've said any number of times that's not an appropriate argument." Gallardo Oral Arg. 33:18. The State merely argued there was not a comparison in that case.

But in neither case did this Court take any corrective action. For the most part, this Court failed to even find the disturbing conduct improper. Where it was found

improper, this Court refused to overturn even a sentence. This Court never even took the simple step to refer Mr. Martinez to the State Bar for discipline. If State Bar disciplinary proceedings are to be the primary tool to punish improper advocate conduct, then this Court should actually take the step of referring an attorney who commits misconduct to the Bar.

Without this Court's action, prosecutors who regularly and repeatedly commit misconduct go without punishment, or even reference to the bar. In reality, the only community left to forward prosecutors to the State Bar is the defense community. But this is the same community, indeed the same attorneys, who have to work with Juan Martinez day in and day out in an attempt to resolve their own death penalty cases. Few, if any, attorneys are going to be willing to risk the very lives of their own clients to forward Martinez's name to the Bar. This Court should not impose such a burden upon the defense community.

At a minimum, if this Court is unwilling to reconsider its decision in this case, this Court should take appropriate steps to ensure prosecutorial misconduct is not incentivized. Even if Shawn's sentence of death must stand, this Court should refer Juan Martinez for disciplinary proceedings and amend the Opinion to name Juan Martinez and reflect this Court's decision to take such action. *See State v. Valdez*, 160 Ariz. 9, 14, 770 P.2d 313, 318 (1989) (overruled on other grounds) ("[I]n cases where there has been misconduct of either the prosecutor or defense counsel, but reversal is

not required, the proper remedy will be affirmance, followed by institution of bar disciplinary proceedings against the offending lawyer, if such proceedings are warranted.").

This Court's decision entrenches a distorted system. Despite nearly twenty instances of misconduct over just a penalty phase, this Court is letting a death sentence stand. Despite engaging in the very same misconduct this Court previously admonished Juan Martinez for in *Morris*, improper personalization, this Court has not even referenced Mr. Martinez by name or indicated it will take the step to refer Mr. Martinez to the State Bar for discipline. Instead, this Court has, yet again, encouraged prosecutors—the people meant to be "ministers of justice"—to engage in kill-at-all-costs advocacy.

II. Scope of Resentencing.

1. Use of the word "was" in A.R.S. § 13-752(N) does not mean the subsection applies only to *Ring* litigants.

As an initial point, this Court's decision regarding A.R.S. § 13-752 rested upon a rationale that was never addressed by either party. Neither party cited to subsection (O) during briefing. Subsection (O) did not come up during oral argument. Neither party supplemented its argument with subsection (O). Because this Court rested its decision upon an argument neither party ever discussed and this Court never brought up during argument, this Court should vacate the Opinion and allow the parties an opportunity to present supplemental briefing and argument regarding subsection (O).

Further, subsection (O) does not support this Court's conclusion. When interpreting a statute's meaning, this Court looks "primarily to the language of the statute itself and give[s] effect to the statutory terms in accordance with their commonly accepted meanings ... 'unless the legislature has offered its own definition of the words or it appears from the context that a special meaning was intended.'" *State v. Reynolds*, 170 Ariz. 233, 234, 823 P.2d 681, 682 (1992). This Court looks "to the words, context, subject matter, and effects and consequences of the statute." *Calvert v. Farmers Ins. Co. of Arizona*, 144 Ariz. 291, 294, 697 P.2d 684, 687 (1985). This Court's ruling that the word "was" in subsection (N) renders the subsection applicable to only *Ring* litigants, Opinion ¶ 57, is not supported by the plain language, context, subject matter, or effects and consequences of the statute. Moreover, nothing in the legislative history of § 13-752 supports this Court's reading.

The word "was" is used eight times throughout § 13-752. From this context, the word "was" does not have any special meaning beyond the standard meaning. For example: in subsection (E), "the trier of fact shall make a special finding on whether each alleged aggravating circumstance has been proved based on the evidence that was presented at the trial or at the aggravation phase;" in subsection (I), "any evidence that was presented at any prior phase of the trial shall be deemed admitted;" in subsection (Q), "If the death penalty was not alleged or was alleged but not imposed," the court decides between life and natural life. Subsection (N) merely repeats the

standard use of the word "was" as the first and third person simple past tense indicative of "be." Put simply, every person who has been sentenced to death and had their conviction overturned "was sentenced to death."

Moreover, this Court's analysis would actually apply more aptly to subsection (O):

> In any case that requires sentencing or resentencing in which the defendant has been convicted of an offense that is punishable by death and in which the trier of fact was a judge or a jury that has since been discharged, the defendant shall be sentenced or resentenced pursuant to this section by a jury that is specifically impaneled for this purpose.

A.R.S. § 13-752 (O). Through its reference to cases that require sentencing or resentencing where a defendant was convicted and the "trier of fact was a judge," subsection (O) actually addresses the *Ring* litigants more directly.

This Court concluded "[t]he history of § 13-752 suggests that subsection (N) applies only to a particular subset of sentences overturned on appeal." Opinion ¶ 57 But this Court failed to cite anything about the actual history of § 13-752 to support this conclusion. This failure was because nothing in the legislative history actually suggests subsection (N) should have such a specious interpretation. The full legislative history, attached as an exhibit, contains no discussion distinguishing between subsections (N) and (O). The entirety of § 13-752, which was enacted as § 13-703.01, was a response to *Ring*, not just subsection (N) in isolation. In fact, both

subsections (N) and (O) were present in the very first draft introduced in both the Senate and the House. No legislative history supports this Court's conclusion.

The legislative history that actually exists would further suggest subsection (O) was intended to deal with *Ring* litigants, not subsection (N). For example, in the Minutes of the Committee on Judiciary for July 31, 2002, Richard Romley testified "there are currently eleven cases in which the individual has been found guilty of first degree murder, is awaiting sentencing, and the death penalty has been alleged." Minutes Committee on Judiciary, 7/31/2002, 7 These were cases that were not "overturned" pursuant to subsection (N). These were cases which required subsection (O).

When the entirety of the statute is read together, subsection (O) applies more generally and subsection (N) is designed to more specifically reference cases like Shawn's. Just as the principle of pari material indicates related statutes should be read together, subsections in a single statute are also read together. *See Moreno v. Jones*, 213 Ariz. 94, ¶ 28, 139 P.3d 612, ¶ 28 (2006). The plain language of subsection (O) operates as an overarching provision to address several similar circumstances: resentencing after the initial trier of fact was a judge, as in the direct *Ring* litigants; sentencing after a break, as in the eleven cases noted by Richard Romley; sentencing after a hung jury, as in subsections (J) and (K); or sentencing after a conviction has been overturned, as in subsection (N). Subsection (N) must be read in concert with

subsection (O). In that sense, subsection (N) is the more specific statute applicable to Shawn's case. Subsection (N) is the one that actually references what occurred in Shawn's case—his sentence was overturned. As this Court has noted, "specific statutory provisions will usually control over those that are general." *City of Phoenix v. Superior Court*, 139 Ariz. 175, 178, 677 P.2d 1283, 1286 (1984). Because subsection (N) is the more specific statute to Shawn's case, subsection (N) applies.

Further, nothing about subsection (O) alters the common understanding of the scope of any such sentencing. Subsection (O) merely provides that when the initial trier of fact is no longer available, "the defendant shall be sentenced or resentenced pursuant to this section by a jury that is specifically impaneled for this purpose." A.R.S. § 13-752 (O). By including the language "pursuant to this section," subsection (O) expressly contemplated that scope would be defined in other subsections. The subsection that applies to Shawn's case is (N). Moreover, "sentenced" would still have the same meaning as advanced in the briefings. Subsections (C) and (D) define the sentencing proceeding as including two phases: the aggravation phase and the penalty phase. Any jury empaneled to "sentence" a defendant would presumably go through both phases. The legislative scheme sets up one exception: when a jury has returned an aggravation phase verdict but not reached a sentence under subsection (K). No such exception is outlined for the present circumstance. Thus, the principle of *expressio unius est exclusio alterius* would control. Under this principle, "the

expression of one or more items of a class indicates an intent to exclude omitted items of the same class." *Champlin v. Sargeant In and For County of Maricopa*, 192 Ariz. 371, ¶ 16, 965 P.2d 763, ¶ 16 (1998). Here, the legislature contemplated an exception to a new sentencing proceeding: when a jury has hung. The legislature enumerated this exception. The legislature expressly differentiated that exception from cases where the sentence was overturned. The existence of subsection (O) does not broaden or expand the legislature's limited exception. Even with subsection (O), where a person's sentence was overturned, as was Shawn's, they are entitled to a new sentencing proceeding under (N).

Finally, the primary case relied upon by Appellant in briefing, and conspicuously ignored in the Opinion, contemplated (O). In *Nordstrom v. Cruikshank*, a panel of Division 2 of the Court of Appeals (which included Justice Pelander) evaluated the interrelation between subsections (N), (O), and (P). 213 Ariz. 434, ¶ 6, 142 P.3d 1247, ¶ 6 (App. 2006). Division 2 closely evaluated the impact of (O). *Id.* at ¶ 13. Applying the same rules of statutory construction, Division 2 concluded, "based on the plain language of the statute, the resentencing must proceed as if Nordstrom had never been sentenced before." *Id.* at ¶ 22. This Court has provided no explanation for how Division 2 erred in *Nordstrom*. Instead, this Court has employed a strained interpretation to avoid admitting it erred in *Lynch I*.

2. This Court's construction improperly converts subsection (N) into an unconstitutional special law.

This Court's interpretation of subsection (N) also renders the subsection unconstitutional as a special law. The Arizona Constitution generally prohibits the promulgation of special laws. Ariz.Const. art. 4, pt. 2, § 19(20). A special law is one that applies only to certain members of a defined class. *See Arizona Downs v. Arizona Horsemen's Foundation*, 130 Ariz. 550, 557, 637 P.2d 1053, 1060 (1981).

A legislative classification defines a given class as either elastic or inelastic (closed). Elastic classifications allow individuals to come within and move without the class. *See Gallardo v. State*, 236 Ariz. 84, 88, 336 P.3d 717, 721 (2014). Closed classifications do not. *Id.* Elastic classifications are usually general laws and, therefore, constitutional. *Id.* Closed classifications are usually special laws and, therefore, unconstitutional. *Id.*

Appellants have challenged a variety of population-based laws as being special laws. The legislature has tied some population-based laws to a particular date or census. *See Petitioners for Deannexation v. City of Goodyear*, 160 Ariz. 467, 773 P.2d 1026 (1989) (limiting class to territory having less than 10,000 persons as of 1980 census); *Republic Inv. Fund I v. Town of Surprise*, 166 Ariz. 143, 800 P.2d 1251 (1990) (analyzing same law). Other laws, however, do not impose a temporal limitation. *See Gallardo*, 236 Ariz. at 86-87, 336 P.3d at 719-20 (limiting class only to counties with population of 3,000,000 persons).

Population-based classifications coupled with particular date are generally closed and, therefore, unconstitutional. *See Town of Gilbert v. Maricopa County*, 213 Ariz. 241, 246-47, 141 P.3d 416, 421-22 (App. 2006) (citations omitted). Population-based laws close classes because, given a date, potential members have no chance of entering in the future. Thus, the classification in *Petitioners for Deannexation* was closed because, as of the 1980 census, only those territories with 10,000 persons were within the class. In contrast, the classification in *Gallardo* was elastic because counties that increase their population to 3,000,000 persons in the future can enter the class, and those counties whose population dips under 3,000,000 persons will leave the class.

On its face, § 13-752 (N) is not an unconstitutional special law. However, as construed by this Court, § 13-752 (N) is a special law because it only applies to a limited class of 31 people. Statutes that apply to a limited class are not necessarily unconstitutional, so long as they allow for entrance and exit from the class at some point in the future. This Court's construction of § 13-752 (N) however, does not allow for entrance and exit from its 31-person class because it fixed the class as of June 24, 2002—the date *Ring II* was decided. *Ring II* makes the *Lynch* Court's subsection (N) class closed because, like the classification in *Petitioners for Deannexation* and *Republic Investment Fund*, no new members can enter the class—appellant's whose *Ring II*-defective sentences were pending as of June 24, 2002.

Because the Court's subsection (N) class is closed, § 13-752 (N), as construed by this Court, is a special law in violation of the Arizona Constitution.

Arizona appellate courts have a duty to construe statutes in such a way to give them, if possible, "a reasonable and constitutional meaning." *Arizona Downs*, 130 Ariz. at 554, 637 P.2d at 1057 (citation omitted). Statutes must also be constructed in such a way to "avoid absurd results." *State v. Gonzales*, 206 Ariz. 469, 470, 80 P.3d 276, 278 (App. 2003) (citation omitted). By construing § 13-752 (N) as an unconstitutional special law, this Court violated this duty. This Court construed § 13-752 (N) in such a way to render it unconstitutional and then relied on this unconstitutional construction to uphold Shawn's death sentence. Construing a statute in a way that renders it unconstitutional and then relying on that statute is an unreasonable result.

Finally, even if not unconstitutional, this Court's interpretation has rendered subsection (N) superfluous. "Interpreting statutory language requires that [this Court] give[s] meaning to each word, phrase, clause, and sentence within a statute so that no part will be superfluous, void, contradictory, or insignificant." *Champlin v. Sargeant In and For County of Maricopa*, 192 Ariz. 371, ¶ 16, 965 P.2d 763, ¶ 16 (1998). By applying (N) to a now extinct class of only 31 people, this Court's interpretation has rendered (N) insignificant and superfluous. The interpretation posed herein and endorsed by *Nordstrom*, however, gives all subsections independent significance.

III. *Simmons* Instruction.

This Court placed heavy reliance upon a single sentence from *Ramdass v. Angelone*: "*Simmons* applies only to instances where, as a legal matter, there is no possibility of parole if the jury decides the appropriate sentence is life in prison." Opinion ¶ 65 (quoting *Ramdass v. Angelone*, 530 U.S. 156, 169 (2000)) (emphasis added by Opinion). From this single sentence, this Court concluded, "Because § 13-703(A) permitted the possibility of Lynch obtaining release, refusing a *Simmons* instruction was not error." Opinion, ¶ 65. This Court made one of two errors. This Court either (1) improperly evaluated possible future legislative changes as conferring a meaningful release opportunity or (2) confused the difference between parole and release by commutation.

The first possible error is drawn from this Court's emphasis of the words "no possibility" as well as this Court's concession that "An instruction that parole is not currently available would be correct ...." *See* Opinion ¶ 65. It is possible this Court attempted to take solace in the State's argument that the legislature could create a parole scheme in the future and apply it retroactively to Shawn. *See* AB 83. But this interpretation would ignore additional language in the very same paragraph as the quoted sentence in *Ramdass*. The Supreme Court expressly noted, "If the *Simmons* rule is extended beyond when a defendant is, as a matter of state law, parole ineligible at the time of his trial, the State might well conclude that the jury would be distracted

from other vital issues in the case." *Ramdass*, 530 U.S. at 169 (emphasis added). This reiterated the same point made in *Simmons*, that "future exigencies such as legislative reform, commutation, clemency, and escape" have little force. *Simmons*, 512 U.S. at 166. The parole eligibility focus is at the time of an appellant's trial. Hypothetical future occurrences do not absolve states from the requirement set forth by *Simmons*.

The second possible error is that this Court has confused the difference between parole and release by commutation. As the very language quoted by this Court states, *Simmons* applies when there is no possibility of parole. A defendant need not be ineligible for all possible forms of release. *Simmons* applies when a defendant is not eligible for parole if sentenced to life, even if clemency is available.

This Court also incorrectly interpreted *Simmons* as permissive, rather than necessary to comport with due process. This Court concluded, "An instruction that parole is not currently available would be correct, but the failure to give the *Simmons* instruction was not error." Opinion ¶ 65. But the very first paragraph of *Simmons* set forth that due process required informing the jury of parole ineligibility: "We hold that where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible." *Simmons*, 512 U.S. at 156 (emphasis added). The Supreme Court did not hold that due process "allows" or "permits" the

sentencing jury to be informed of parole ineligibility; the due process clause requires the jury be informed of parole ineligibility.

Here, this Court conceded both of the necessary predicates to a *Simmons* instruction. First, Shawn's future dangerousness was put at issue. Opinion ¶ 64 ("The State suggested at trial that Lynch could be dangerous."). Second, state law prohibited Shawn's release on parole because parole had been abolished. *Id.* ("Further, parole is available only to individuals who committed a felony before January 1, 1994, and juveniles."). Thus, "due process require[d] that the sentencing jury be informed that [Shawn was] parole ineligible."

By ruling the failure to provide a *Simmons* instruction was not error, this Court has incorrectly read a constitutional mandate as permissive. Not even the language quoted by this Court supports such an interpretation.

The final conclusion reached by this Court is that the proposed instruction was overly broad. As an initial point, this does not matter. The request was made and due process requires the jury be informed of parole ineligibility. If the proposed instruction was overly broad, the trial court was free to fashion a proper instruction. But plain rejection of a constitutionally required instruction is not permitted on the grounds that the instruction requested by the defendant was overly broad. A trial court is not permitted to throw the baby out with the bath water. This is why *de novo* review of jury instructions makes so much sense. *See* Opinion ¶ 63 (applying *de novo*

review). The focus is to ensure the jury instructions accurately stated the law. Here, the jury instructions did not accurately state the law. Once the prosecution put future dangerousness at issue, due process required the jury be informed of Shawn's parole ineligibility. Whether by the instruction proposed by Shawn in the moving papers, the instruction proposed by Shawn during oral argument, repetition of the instruction approved in *Simmons*, or a new instruction fashioned by the trial court, an instruction was necessary. Without such an instruction, the jury charge did not correctly explain the law.

But this Court's ruling that Shawn's proposed instruction was over-broad is also incorrect. A comparison of Shawn's instruction and the instruction approved in *Simmons* demonstrates this point:

Shawn's proposed instruction	Instruction approved in *Simmons*
Your decision is not a recommendation. Your decision will be binding. If your verdict is that Mr. Lynch should be sentenced to death, he will be sentenced to death. If your verdict is that Mr. Lynch should be sentenced to life he will not be sentenced to death and the court will sentence him to natural life which means Mr. Lynch would never be released from prison for his entire life. I. 650 at 9.	I charge you that these sentences mean what they say. That is, if you recommend that the defendant Jonathan Simmons be sentenced to death, he actually will be sentenced to death and executed. If, on the other hand, you recommend that he be sentenced to life imprisonment, he actually will be sentenced to imprisonment for the balance of his natural life. *Simmons*, 512 U.S. at 160

The instruction proposed here mirrored much of the instruction approved of in *Simmons*. The jury is told the sentences mean what is said. The jury is told that if

they sentence the defendant to death, the defendant will be sentenced to death. The instructions both tell the jury that if they sentence the defendant to life, the defendant will not be released for the remainder of his life. Indeed, both instructions use the phrase "natural life."

Just as in Arizona, commutation or clemency was available in South Carolina. *Simmons*, 512 U.S. at 166. This availability did not alter the propriety of the instruction. Nor does the availability of commutation render Shawn's proposed instruction improper.

This Court also failed to consider the broader impact of the trial court's decision. Specifically, Shawn was deprived of the opportunity to present a complete defense and combat the State's argument that Shawn was a danger. As was noted during oral argument, this issue actually arose during the first trial. The State filed a motion to preclude arguments regarding parole on the grounds that other forms of release were available in 2005. I. 226. The trial court granted the motion. I. 274. The failure to comport with *Simmons* was raised on appeal in *Lynch I*. *See Lynch I* OB, 75-78 (2008 WL 6587570). However, because this Court vacated the death sentence and ordered a new sentencing hearing, this Court did not evaluate the *Simmons* claim in *Lynch I*.

With this history in mind, the Motion filed on retrial was an attempt to reintroduce the *Simmons* issue with the law of the case in mind. The trial court had

already ordered Shawn could not present parole ineligibility through evidence or argument. This Court did not change that ruling. In order to comport with the law of the case but take a different approach to the issue, Shawn asked to waive any parole eligibility he had and for an instruction.

But the impact in this case goes beyond the failure to give an instruction. The State was permitted to argue Shawn was a future danger. Shawn, though, was not permitted to challenge the State's argument. Shawn was not permitted to present evidence of parole ineligibility, argue he was ineligible for parole, or even have an instruction regarding parole ineligibility. Because "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense,'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986), defendants must be afforded the opportunity to deny or explain the State's arguments. "Where the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty," the due process clause requires "that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain.'" *Skipper v. South Carolina*, 476 U.S. 1, 5 n.1 (1986). This was the heart of *Simmons*. *See Simmons*, 512 U.S. at 164-65. As the Supreme Court noted, "sending a man to his death 'on the basis of information which he had no opportunity to deny or explain' violate[s] fundamental notions of due process." *Simmons*, 512 U.S. at 164 (quoting *Gardner v. Florida*, 430 U.S. 349, 362 (1977)).

When the prosecutor is permitted to argue a defendant should be sentenced to death because he poses a future danger, as was done here, a defendant must be able to meet this evidence. To comport with this basic right when parole is not available, a defendant must be permitted to rely upon the present status of the law to argue he does not pose a future risk. Shawn was deprived of this right in every way. Shawn was not eligible for parole but was denied the opportunity to present evidence or argument of this ineligibility. Shawn was even deprived of an instruction regarding his parole ineligibility.

IV Juror 5.

1. This Court applied pre-empanelment procedures to a post-empanelment strike.

Foremost, this Court ignored the distinction between pre- and post-empanelment decisions. The very structure of Rules 18.4 and 18.5 apply to pre-empanelment motions. Rule 18.4, which sets forth the process for challenges, designates the order as: challenges to the panel, challenges for cause, and peremptory challenges. Rule 18.4(a)-(c). Rule 18.5 applies a similar process: swearing the panel, calling jurors for examination, inquiry by the court with a possible brief opening statement, voir dire examination, challenges for cause, peremptory challenges, and selection of the jury. Ariz.R.Crim.P 18.5 (a)-(h).

This Court's case citations entrench the misapplication of pre-empanelment procedures to a post-empanelment issue. This Court relies upon *State v. Lavers* to

support its assertion that Shawn "bore 'the burden of establishing that the juror [wa]s incapable of rendering a fair and impartial verdict.'" Opinion ¶ 71 (quoting *State v. Lavers*, 168 Ariz. 376, 390, 814 P.2d 333, 347 (1991). Three paragraphs later, this Court cited *State v. Hill* to support the proposition, "Although knowledge of or professional acquaintance with a witness calls a juror's objectivity into question, it does not require automatic disqualification." Opinion ¶ 74 (citing *State v. Hill*, 174 Ariz. 313, 319-20, 848 P.2d 1375, 1381-82 (1993).

But neither case applies to post-empanelment issues; both cases apply to pre-empanelment strikes. In *Lavers*, this Court noted Lavers attempted to strike "a prospective juror." *Lavers*, 168 Ariz. at 390, 814 P.2d at 347 In *Hill*, the trial court's denial "forced [Hill] to use a peremptory challenge to remove" the prospective juror. *Hill*, 174 Ariz. at 319, 848 P.2d at 1381.

The rules contemplate what should be done in a pre-empanelment scenario. The cases have reviewed abuse of discretion in a pre-empanelment scenario. But this is not a pre-empanelment case. The Reply Brief expressly argued the two scenarios needed to be treated differently because of the availability of peremptory challenges. Under 18.4, 18.5, *Lavers*, and *Hill*, the defendant still has an opportunity to exercise peremptory strikes. Trial courts can be afforded such deference in a pre-empanelment scenario because the losing party can still correct the error, as was actually done in *Hill*. Imposing a harsher standard upon the losing party thus makes sense. Because

the party had the opportunity to use a peremptory challenge, the party should prove the jury that was actually empaneled could not be fair.

But Shawn had no such opportunity. The harmful information did not arise until the middle of trial. Shawn was not permitted to use a peremptory strike at that point.

This is why Shawn argued the appropriate standard for a post-empanelment strike was set forth by the Florida Supreme Court in *De La Rosa v. Zequeira*, 659 So.2d 239, 241 (Fla. 1995). However, this Court ignored the argument.

2. This Court incorrectly read and applied *Bible*.

Admittedly, *Bible* dealt with a post-empanelment strike. But as pointed out in the Reply Brief, this Court's evaluation in *Bible* was actually more expansive than the "test" set forth therein. This Court's evaluation actually mirrored the *De La Rosa* test.

To the extent this Court applied the *Bible* analysis, this Court refused to actually engage in the weighing required by *Bible*. Instead, this Court made two errors in its analysis. First, this Court opted to evaluate just the two elements that did not weigh so heavily in Shawn's favor. Second, this Court failed to appropriately engage in the weighing test mandated by *Bible*; instead this Court imposed a burden on Shawn to prove that each prong would have independently warranted dismissal of the juror.

a. This Court inaccurately recited the *Bible* test.

Foremost, this Court improperly conjoined two prongs of the test into a single prong: "(3) the importance of the testimony and whether the testimony was disputed." Opinion ¶ 73. *Bible* set forth the test as follows:

> In deciding whether a juror may continue to sit in this situation, the court must consider the relationship between the witness and the juror, whether the juror will properly assess the testimony, the importance of the testimony, and whether the testimony is disputed.

Bible, 175 Ariz. at 574, 858 P.2d at 1177. This Court's recounting, however, removed the comma between "the importance of the testimony" and "whether the testimony is disputed." As Rule 2 in Strunk & White instructs, "In a series of three or more terms with a single conjunction, use a comma after each term except the last." Strunk & White, The Elements of Style, 2 (4th ed. Longman). This is known as the serial comma. *Id.* The failure to include serial commas has prompted two separate articles in Susie Salmon's "The Legal Word" column in Arizona Attorney magazine over the last year and a half, including the issue published just this month. *See* Susie Salmon, "No Comma Drama (Part One)," Arizona Attorney, October 2015; Susie Salmon, "To Oxford or Not to Oxford? A Serial (Comma) Dilemma," Arizona Attorney, April 2014. From the debate over serial commas, a simple principle emerges: a serial comma can be interpreted into a sentence, but a serial comma cannot be interpreted out of a sentence.

In *Bible*, this Court used a serial comma, indicating the intent to separate "whether the testimony is disputed" as the fourth factor to be considered. Correctly framed, a trial court should consider: "[1] the relationship between the witness and the juror, [2] whether the juror will properly assess the testimony, [3] the importance of the testimony, and [4] whether the testimony is disputed." This construction correctly considers the serial comma.

This construction also makes the most common sense. Testimony can be disputed but unimportant. The inverse is also true; criminalist testimony about the identity of a drug is often important but undisputed. Recognition of the serial comma is the only way to appropriately weigh those circumstances in relation to the first two factors.

b. This Court misapplied *Bible*.

i. This Court failed to weigh the third and fourth prongs of *Bible*.

Regardless of construction, *Bible* requires the courts to weigh multiple factors. Nothing in *Bible* indicates one or two prongs are dispositive. But this Court refused to weigh the third and fourth factor. Instead, this Court opted to evaluate just the first two factors. This Court's failure to actually evaluate the final one or two prongs is problematic. Dr. Honan's testimony was incredibly important. One of Shawn's primary mitigation arguments was that he was ill from Hepatitis C and had little time to live. Shawn called Dr. Altschuler to testify about his illness and life-expectancy

Dr. Honan was called by the State to refute this mitigation. To that extent, the testimony was very important under the third prong of the *Bible* test. The competing experts also demonstrate that the testimony was disputed. Whether classified as prong three or prongs three and four, these factors weigh heavily in Shawn's favor.

ii. This Court improperly shifted the burden to Shawn to prove each *Bible* prong in a vacuum.

Finally, this Court completely altered the *Bible* burden. This Court concluded Shawn could not prevail because he did not prove (1) the relationship, on its own, was sufficient to dismiss the juror or (2) Juror 5's knowledge, on its own, would prevent her from being fair. But *Bible* did not say to look at each element in a vacuum. And doing so would be unfair to parties who learn of juror knowledge post-empanelment.

Certainly, Juror 5 was not a relative or close friend of Dr. Honan's. Juror 5 did not work closely with Dr. Honan. But nothing in *Bible* required Shawn to prove this sort of relationship. *Hill* approved of keeping a juror who was professionally acquainted with members of the State in a pre-empanelment scenario. In *Hill*, the defense had the opportunity to use a peremptory strike. While Juror 5's relationship with Dr. Honan may not have been independently adequate to warrant dismissal, the existence of a relationship that was not revealed to Shawn should actually weigh in Shawn's favor.

Juror 5's knowledge was also limited. It is not as if the juror had personally had Dr. Honan as a doctor and had a wonderful experience. Her contact was primarily

with Dr. Honan's residents. Thus, in a pre-empanelment setting, this issue alone might not be sufficient to justify dismissal. But knowledge and bias nonetheless existed.

Juror 5 admitted she had a favorable opinion of Dr. Honan. This Court placed heavy weight in her assurance she could remain fair. But, as the United States Supreme Court has noted, bias is often unconsciously held. *U.S. v. Abel*, 469 U.S. 45, 52 (1994). Further, no curative steps were taken by the trial court. The trial court never instructed Juror 5 to set aside her opinions of Dr. Honan. Rather, the trial court's closing instructions affirmatively advised Juror 5 to consider her preconceived opinion of Dr. Honan. While Juror 5's knowledge of Dr. Honan's reputation is perhaps not enough to warrant dismissal on its own, the existence of knowledge that was not revealed during voir dire and the trial court's failure to take corrective measures should actually weigh in Shawn's favor in the scope of the entire test.

Although neither factor, on its own, would warrant dismissal of Juror 5 in a pre-empanelment setting, neither factor is considered in isolation post-empanelment. *Bible* demands that four (or three as this Court has outlined it) factors be considered simultaneously. No one factor is dispositive. When the two first factors are weighed against the importance of Dr. Honan's testimony and the fact that the testimony was hotly disputed, the balance of considerations should weigh in Shawn's favor:

(1) There was a professional relationship between Juror 5 and Dr. Honan. While this was described as a minor relationship, the relationship existed.

(2) Juror 5 had a favorable opinion of Dr. Honan. The trial court took no steps to encourage Juror 5 to set these pre-existing opinions aside. Rather, the standard instructions encouraged Juror 5 to rely upon these pre-existing opinions.

(3) The topic of Dr. Honan's testimony was vitally important. Shawn had presented an expert witness to explain the implications of Shawn's Hepatitis C diagnosis and his life expectancy. Shawn's diagnosis and life expectancy was a primary component o his mitigation case.

(4) The topic of Dr. Honan's testimony was disputed. Indeed, Dr. Honan's entire purpose was to dispute Dr. Altschuler's testimony that Shawn only had a short time to live. As such, Dr. Honan's testimony disputed testimony from a defense expert and actively challenged Shawn's alleged mitigation.

Because this Court failed to analyze several of Shawn's arguments and misapplied the *Bible* test, this Court should reconsider its decision.

CONCLUSION

For the reasons stated above, this Court should reconsider its Opinion.

Respectfully Submitted on October 13, 2015.

MARICOPA COUNTY PUBLIC DEFENDER

By /s/
Tennie B. Martin
Deputy Public Defender

By /s/
Mikel Steinfeld
Deputy Public Defender

GATBMMS101315P

APPENDIX – F –

1

PUBLIC DEFENDER
NOV 30 2015
APPEALS RECEIVED

SUPREME COURT OF ARIZONA

STATE OF ARIZONA,	)	Arizona Supreme Court
	)	No CR-12-0359-AP
Appellee,	)	
	)	Maricopa County
v	)	Superior Court
	)	No. CR2001-092032
SHAWN PATRICK LYNCH,	)	
	)	**FILED 11/30/2015**
Appellant.	)	
	)	
	)	

O R D E R

On October 13, 2015, Appellant Shawn Patrick Lynch filed a "Motion for Reconsideration." Upon review and consideration, IT IS ORDERED denying the motion.

DATED this __30th_____ day of November, 2015

/s/
Robert M. Brutinel, Justice

TO:
Lacey Stover Gard
Jeffrey L Sparks
Tennie B Martin
Mikel Steinfeld
Shawn Patrick Lynch, ADOC 206125, Arizona State Prison,
Florence - Eyman Complex-Browning Unit (SMU II)
Diane Alessi
Amy Armstrong
Dale A Baich

APPENDIX – G –

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
07/12/2012 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 2001-092032 07/10/2012

HON. KAREN L. O'CONNOR

CLERK OF THE COURT
C. Smith
Deputy

STATE OF ARIZONA JUAN M MARTINEZ

v.

SHAWN PATRICK LYNCH (A) LAWRENCE H BLIEDEN
JOEL T BROWN

CAPITAL CASE MANAGER

TRIAL MINUTE ENTRY
DAY TWO

Courtroom SCT 8A

State's Attorney:	Juan Martinez
Defendant's Attorney:	Lawrence Blieden and Joel Brown
Defendant:	Present

Court Reporter, Lori Fraley, is present.

A record of the proceeding is also made by audio and/or videotape.

9:26 a.m. Trial to jury continues from June 26, 2012.

This is the time set for continuation of jury selection.

The jury panel is not present.

The Court having been informed that Juror 64 approached Defense counsel to inform them of her opinion of her ability to serve as a fair and impartial juror,

IT IS ORDERED Juror 64 is excused.

The Court having informed counsel that Juror 53 advised that she was involved in a serious automobile accident and is facing surgery,

IT IS ORDERED Juror 53 is excused.

LET THE RECORD REFLECT Jurors 9, 43, 49, 61, 62, 81, 93, 107 and 228 are present.

Voir dire examination continues.

Counsel approach the bench with the Court Reporter and discussion is held out of hearing of the jury panel.

Voir dire examination continues.

Counsel approach the bench with the Court Reporter and discussion is held out of hearing of the jury panel.

Voir dire examination continues.

Counsel approach the bench with the Court Reporter and discussion is held out of hearing of the jury panel.

Voir dire examination continues.

10:49 a.m. The jury panel is reminded of the admonition and leaves the courtroom.

Court remains in session.

Discussion is held.

10:50 a.m. Court stands at recess.

11:05 a.m. Court reconvenes with respective counsel and the Defendant present.

Court Reporter, Lori Fraley, is present.

A record of the proceeding is also made by audio and/or videotape.

Voir dire examination continues.

Counsel approach the bench with the Court Reporter and discussion is held out of hearing of the jury panel.

Voir dire examination continues.

11:28 a.m. The jury panel is reminded of the admonition and leaves the courtroom.

Court remains in session.

Argument is heard on strikes for cause.

Juror 43 is present in the courtroom and individual voir dire commences.

Juror 43 leaves the courtroom.

Those jurors not called are excused by the Court.

12:00 p.m. Court stands at recess.

1:30 p.m. Court reconvenes with respective counsel and the Defendant present.

Court Reporter, Lori Fraley, is present.

A record of the proceeding is also made by audio and/or videotape.

The jury panel is not present.

The Court hears Defendant's objection to the State advising the prospective jurors that the previous jury found that the crime was especially cruel, heinous or depraved.

Argument is heard.

LET THE RECORD REFLECT the Defendant has filed a motion in limine regarding the matter.

The Court has not yet received a copy of the motion. The motion does not appear in iCIS. Counsel will deliver a copy of the motion to the Court.

IT IS FURTHER ORDERED that the parties shall clearly state that two aggravating factors were found by a prior jury during the jury selection process.

LET THE RECORD REFLECT Jurors 1, 3, 8, 19, 31, 32, 34, 37, 42, 89, 117 and 215 are present.

Voir dire examination continues.

2:30 p.m. The jury panel is reminded of the admonition and court stands at recess.

2:53 p.m. Court reconvenes with respective counsel and the Defendant present.

Court Reporter, Lori Fraley, is present.

A record of the proceeding is also made by audio and/or videotape.

The jury panel is present.

Voir dire examination continues.

3:47 p.m. The jury panel is reminded of the admonition and leaves the courtroom.

Court remains in session.

Juror 215 is present in the courtroom and individual voir dire commences.

Juror 215 leaves the courtroom.

Juror 8 is present in the courtroom and individual voir dire commences.

Juror 8 leaves the courtroom.

Juror 32 is present in the courtroom and individual voir dire commences.

Juror 32 leaves the courtroom.

Discussion is held.

The jury panel is present.

Discussion is held with the prospective jurors regarding conversations held outside the courtroom regarding jury selection.

The Court reiterates the importance of understanding and complying with the admonition.

4:17 p.m. The jury panel leaves the courtroom.

Court remains in session.

Argument is heard on strikes for cause.

Juror 89 is struck for cause. All other potential jurors are excused until July 17, 2012 at 10:30 a.m. in this division.

Discussion is held.

4:20 p.m. Court stands at recess until July 11, 2012 at 9:00 a.m. in this division.

This case is eFiling eligible: http://www.clerkofcourt.maricopa.gov/efiling/default.asp. Attorneys are encouraged to review Supreme Court Administrative Order 2011-140 to determine their mandatory participation in eFiling through AZTurboCourt.

APPENDIX – H –

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, vs SHAWN P LYNCH, Defendant	)	CR-12-0359-AP CR2001-092032(A)

BEFORE THE HONORABLE KAREN L O'CONNOR

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Phoenix, Arizona
July 10, 2012

(Original)

By: Lori Fraley
Certified Reporter
AZ CR No: 50331

Pages 2 through 116 omitted.

process in the State of Arizona versus Shawn Patrick Lynch Are you okay?

The record will reflect the presence of our jury panel, which in this panel is Jurors numbers 1, 3, 8, 19, 31, 32, 34, 37, 42, 89, 117 and 215

The record will also reflect the presence of counsel and Mr Lynch

Ladies and gentlemen, I just want to remind you that you all took an oath the last time you were here, I think it was June 26th, 2012 That oath remains in effect today Does everyone understand?

(Affirmative response)

Counsel -- you're here today because counsel may have some follow-up questions for you, based upon your responses from your questionnaires, and I think everyone has your questionnaire with you today?

Okay I anticipate that the questions will deal with, in part following up on your responses to your questions relating to the death penalty

As you know, by reading the questionnaire and by my reading you some of the questionnaire, is that you only have a very brief summary of what this case is about.

And the questionnaire was not intended to

Pages 118 through 129 omitted.

THE COURT: Okay Anyone else? All right

Is there anyone here that since the last time we met, has talked about this case to anyone or has done any research on the case?

All right Has anyone looked the case up on the internet?

All right You know that's a no, no You're not supposed to do that, okay That's still in effect, that order -- court order is still in effect

All right I guess with that, Mr Martinez

MR MARTINEZ: Thank you

Good afternoon Assisting me throughout the trial will be Detective Hugh Lockerby of the Scottsdale Police Department That's the individual that you see seated here in case you were curious

With regard to your potential jury selection, we, or the State believes that everybody that comes here has feelings and we are not asking you to set those aside

Does anybody here think that just because they have feelings about the death penalty either way, that they cannot serve?

I don't see any affirmative answers there.

Pages 131 through 150 omitted.

officer, which is not going to be presented but a police officer drank alcohol, would you be likely to identify with him more or less because of your previous experiences or do you think that you can put that aside?

PROSPECTIVE JUROR 31: I -- no, I can put that aside

MR. MARTINEZ: And same if one of the participants here, if that was brought up, that there was some alcohol involved, given your knowledge of what appears to be your knowledge of alcohol, can you lay that aside and just decide the case based on what is presented here? Can you do that?

PROSPECTIVE JUROR 31: Yes

MR. MARTINEZ: Thank you

Number 32, I have to ask you about the incident where you called the police --

PROSPECTIVE JUROR 32: Yes, sir, I'm number 32

MR MARTINEZ: Pardon?

PROSPECTIVE JUROR 32: Yes, sir, I'm number 32

MR. MARTINEZ: Yeah Do you want to discuss that in private or do you want to talk about that incident when you called the police?

PROSPECTIVE JUROR 32: There's -- we can talk about it

MR MARTINEZ: It's an interesting incident Number 34, you were able to take care of your issues with your employment?

PROSPECTIVE JUROR 34: Yes

MR. MARTINEZ: I think you already told us and everything is fine with that?

PROSPECTIVE JUROR 34: Correct

MR MARTINEZ: Okay The same thing -- question you indicated with regard to mental health experts that they are capable of explaining characteristics of human behavior; that is what you said, right? With regard to that, do you believe the way you phrase that is that somehow they can predict, if you will, what a person is thinking, is that sort of what you were saying, that because of their training and knowledge that they can sort of get into somebody's head and know what they're thinking or did you mean something else?

PROSPECTIVE JUROR 34: Not thinking but as far as the type of person that they are

MR MARTINEZ: Right

PROSPECTIVE JUROR 34: They perceive stuff

MR. MARTINEZ: Again, what if you are

listening to a mental health expert and that mental health expert is saying things, whatever it is that they're saying and you're sitting there and you're saying that's a bunch of hogwash Are you going to be able to separate yourself from what you hear here and say well, that person may have a lot of learning and that person may have gone to college and done all that, but based on what I know, that's not true, and will you then be able to then reject, if that's the case, their opinions?

PROSPECTIVE JUROR 34: Yes

MR. MARTINEZ: Okay Thank you

Number 42, I think you're retired from Maricopa County, correct?

PROSPECTIVE JUROR 42: Yes

MR. MARTINEZ: What did you do for Maricopa County?

PROSPECTIVE JUROR 42: I worked for juvenile court

MR MARTINEZ: And what did you do there at the juvenile courts?

PROSPECTIVE JUROR 42: I was a transportation officer I shackled and handcuffed juveniles, took them to court, took them to the hospital, went on warrants to other parts of the

Pages 154 through 198 omitted.

MR. BROWN: Okay And it's fine that you're in dark waters, but I think, as Mr Martinez mentioned this, not to you directly but to the panel, about the process All right I'm assuming you are not in dark waters about the process?

PROSPECTIVE JUROR 31: Absolutely not, no

MR BROWN: Okay You know what the determination is going to be and your assessment of aggravation and mitigation, you do understand that as well?

PROSPECTIVE JUROR 31: One more time?

MR BROWN: Do you understand that ultimately you're going to make an assessment as to the penalty based on aggravation and mitigation?

PROSPECTIVE JUROR 31: Yes

MR BROWN: Juror number 32

PROSPECTIVE JUROR 32: Yes, sir

MR BROWN: Do you understand that when you are told to make an assessment as to the penalty and to determine whether mitigation is sufficiently substantial, that it's not a mathematical situation?

PROSPECTIVE JUROR 32: Yes

MR BROWN: It's not a matter of whether there is more aggravators or more mitigators?

PROSPECTIVE JUROR 32: Yes.

MR BROWN: Do you understand that it's not like artificially -- hey, you assign points to certain aggravators and you assign points to certain mitigators and you add them all; up do you understand that?

PROSPECTIVE JUROR 32: Yes

MR BROWN: Okay Do you understand that ultimately you will be asked to make your evaluation based on your values and you ultimately have to make a determination as to where life is the appropriate sentence or not? Do you understand that?

PROSPECTIVE JUROR 32: Yes

MR BROWN: And you feel you're able to do that?

PROSPECTIVE JUROR 32: Yes, I do

MR BROWN: Juror 215 Okay I know you wanted to answer some things in private, but I do have a question I think it's 15(c) and you are asked if you know any prison, jail or detention center, probation service or anyone responsible for correctional work, and you said, yes And on the yes, response on the next page, eight, I thought that was a yes response to some of the other questions about social work?

PROSPECTIVE JUROR 215: What do I have to

Pages 201 through 220 omitted.

THE COURT: No? Okay

PROSPECTIVE JUROR 8: I mean, no I don't I would have to see the person

THE COURT: Okay But sitting here today you haven't recognized anybody?

PROSPECTIVE JUROR 8: No

THE COURT: All right Thank you

Let's bring Juror number 32

(Whereupon, Juror number 8 exits the courtroom and Juror number 32 was present in the courtroom)

THE COURT: All right The record will reflect that we are here with Juror number 32 outside the presence of our other jurors -- potential jurors

Juror number 32, I believe you were being asked about your responses in your questionnaire

Was it question 16 or question 18? I don't remember

MR MARTINEZ: 18

THE COURT: 18 So I think counsel wanted to follow up with that

MR MARTINEZ: I did

THE COURT: All right Go ahead, Mr Martinez

MR. MARTINEZ: I was asking you about

question 18 and basically, I just wanted to know what happened. I know it was your wife and it appears you actually called the cops

PROSPECTIVE JUROR 32: Yes

MR MARTINEZ: Why don't you tell me what was going on?

PROSPECTIVE JUROR 32: We had both been drinking that evening and we got into an argument and she -- to end it, she wanted to leave and I felt because of our positions, we both work for City of Phoenix and I felt her being drunk and getting pulled over before an accident, anything that we would be liable for, it would be better than her being involved in an accident

MR MARTINEZ: Was she very angry at you afterwards?

PROSPECTIVE JUROR 32: Yes, but she realized that she shouldn't have left and we're together

MR MARTINEZ: So you're -- that was my next question, you guys are still together?

PROSPECTIVE JUROR 32: Yes

MR MARTINEZ: Was she actually pulled over after you called?

PROSPECTIVE JUROR 32: No, she made it to

where she was going at her sister's house

MR MARTINEZ: And did the police, did they contact her there or what happened?

PROSPECTIVE JUROR 32: I'm not sure if the sheriff's office contacted her there or not

MR MARTINEZ: Was that in Phoenix or somewhere else?

PROSPECTIVE JUROR 32: We lived in Maricopa County, we were -- it was north

MR MARTINEZ: Anything about that that -- for example, let's say there is alcohol involved in this case, anything about the use of alcohol -- because it sounds like you were extremely contentious -- I don't think I've ever heard that before, for somebody to call the police on their own wife who was intoxicated and driving

But if you were to find out, not that there would be, but if you were to find out that there were alcohol involved in this particular case, would that have a tendency to impact you so that you could not be fair and impartial in this case?

PROSPECTIVE JUROR 32: No

MR. MARTINEZ: I don't have anything else Thank you

THE COURT: Mr Brown, anything?

MR BROWN: I don't have any questions

THE COURT: Sir, you can go ahead and step out in the hallway

PROSPECTIVE JUROR 32: Thank you

(Whereupon Juror number 32 was excused from the courtroom)

THE COURT: All right Before I ask whether or not anyone has any strikes for cause, I intend to bring the jury back in here and ask them if anyone knows about any discussions regarding the case, and if so, what it was about Or if counsel wants to handle it a different way, I'm open to suggestions

MR MARTINEZ: My preference would be that you ask the questions

MR BROWN: I am hoping you would ask the questions

THE COURT: I know but I mean --

MR BROWN: The way you suggested seems appropriate I don't have a better suggestion to offer the Court

THE COURT: All right Let's bring them all back in

(Whereupon, the prospective jury panel was present in the courtroom.)

THE COURT: Please be seated The record will reflect the presence of our jury panel

Ladies and gentlemen, for those of you that were out in the hallway and that had any conversation regarding the case, or questions you were asked by the attorneys during the jury selection process or anything about the case whether it was, you know, how people were dressed or anything that you felt was very innocent to talk about, but the fact that you were talking about anything that was going on inside of this courtroom, I would like you to just have a seat And then anyone else can stand up and leave the courtroom because I want to ask those people questions

So for those of you that were not involved in any conversation regarding anything that was going on in the case, you can go ahead and step outside of the courtroom

Thank you Okay We will start with Juror number 3 Why don't you tell me what was talked about and what if anything you said?

PROSPECTIVE JUROR 3: Okay We talked about being hungry.

THE COURT: Okay

PROSPECTIVE JUROR 3: Didn't know it was

going to be so long

THE COURT: Well, I know, we're trying to move this along

PROSPECTIVE JUROR 3: I think we talked about how some of the questions seemed very sequacious, hard to answer

THE COURT: Okay

PROSPECTIVE JUROR 3: And that we feel a responsibility to answer correctly and so when the questions are a little bit sequacious, it is more difficult to just be straightforward

THE COURT: All right Did you talk about any specific questions in general or anything about -- anything else about the case?

PROSPECTIVE JUROR 3: Not specifically, no

THE COURT: Okay

PROSPECTIVE JUROR 3: I don't think so

THE COURT: All right

And Juror number 19

PROSPECTIVE JUROR 19: No

THE COURT: What did you --

PROSPECTIVE JUROR 19: We didn't talk about the case I said I never thought I would get rattled on the stand and now I think I would.

THE COURT: Okay. Were you part of this --

I mean, were you all talking together?

PROSPECTIVE JUROR 19: Yes

THE COURT: All of you? The whole group here?

PROSPECTIVE JUROR 19: Yes

THE COURT: Okay So for the record, Jurors numbers 3, 19, 89, 42, 37 and 34

A JUROR: Yes

THE COURT: And would you all agree with Juror number 3 as to what was discussed?

A JUROR: Yes

THE COURT: Anything anyone wants to add?

Juror number 89

PROSPECTIVE JUROR 89: I just discussed jury service in general, about how the last time I had been summoned for jury duty I had to serve in Mesa I actually didn't serve but I was sent to Mesa and I briefly mentioned that looking at the schedule, we were determining, are we going to have to come back tomorrow or Thursday for the jury selection process, and I said that my husband had served on a jury before for two and a half days and they had the selection process completed in the morning and that they started the jury -- the trial that afternoon

I was just speculating that if any of us

have to come back on Thursday morning to continue the trial, it might start that day rather than what was on the schedule that said trial date

THE COURT: Okay

PROSPECTIVE JUROR 89: Just from my experience with my husband

THE COURT: All right Anything else?

Juror number --

A JUROR: I just want to reiterate that we discussed like are we going to be coming back tomorrow or the next day or you know -- that's -- we were all like up in the air We don't know so we were just trying to guess

THE COURT: I know

A JUROR: I think it was in conjunction with the food and restroom --

PROSPECTIVE JUROR 42: Yeah, where the food was and how far down you had to go to get a drink or you know -- I mean, a drink other than water

THE COURT: Okay

(Whereupon, the court reporter asked the juror to please identify herself)

PROSPECTIVE JUROR 42: I'm sorry, I'm number 42 In other words, like a drink out of a machine.

THE COURT: Right Okay

And, Juror number 3, did you want to add anything?

PROSPECTIVE JUROR 3: Just that Cheryl keeps telling us that she can't answer any questions out there that we need to ask you and you're happy to answer our questions

THE COURT: All right That's exactly right Okay Anyone else want to add anything?

PROSPECTIVE JUROR 37: I guess just to reiterate what she said -- it's 37, we were just talking about the questions that we didn't understand or we were getting confused Me personally, I didn't feel like I was getting my answers across and so I was kind of elaborating on that

THE COURT: All right And, Juror number 34, anything to add?

PROSPECTIVE JUROR 34: No

THE COURT: All right From now on -- I know it's hard to really not talk about -- together, you're in this together and, you know, you're sharing the same experiences It's not hard to talk about those kind of things but it is important that what goes on in this courtroom stays in this courtroom and you are not to talk about anything that goes on in

the courtroom regardless of whether you think it's an innocent conversation or not because someone might overhear and think it's something more than that and that's really not fair to the parties

The parties are relying on you only to make the decisions in this case based upon what goes on in this courtroom, not what goes on in conversations that go on outside of the courtroom, okay

Now, does anyone think that because of your conversation outside of the courtroom today that would affect your ability to be fair and impartial in this case at all?

PROSPECTIVE JUROR 34: No

THE COURT: Do counsel have any follow up?

MR. MARTINEZ: No, thank you

MR. BLIEDEN: No, I do not

THE COURT: If you would step outside of the courtroom one more time and we will get right back to you and I will tell you when you have to come back. All right Thank you

(Whereupon the jury panel was excused from the courtroom)

THE COURT: All right We are outside the presence of the jury panel Are there any strikes for cause?

Pages 231 through 235 omitted.

APPENDIX – I –

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,	)	
	)	
Plaintiff,	)	
	)	CR-12-0359-AP
vs	)	CR2001-092032(A)
	)	
SHAWN P LYNCH,	)	
	)	
Defendant	)	
	)	

BEFORE THE HONORABLE KAREN L O'CONNOR

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Phoenix, Arizona
July 16, 2012

(Original)

By: Lori Fraley
Certified Reporter
AZ CR No: 50331

Pages 2 through 12 omitted.

PROSPECTIVE JUROR 281: It's August 20th

THE COURT: Okay August 20th is not -- wait, I'm in the wrong month, sorry about that The vacation was planned over the weekend of the 17th, 18th and 19th, is that --

PROSPECTIVE JUROR 281: It says trial day on my --

THE COURT: You're right You are correct, it is a trial date I was wrong

PROSPECTIVE JUROR 281: Okay

THE COURT: Is that something that would cause you an undue hardship if you missed that day?

PROSPECTIVE JUROR 281: My wife is going to be unhappy, but we're meeting her family up there, so --

THE COURT: Is that something you would be willing to do to serve on the jury?

PROSPECTIVE JUROR 281: If I need to

THE COURT: Anything else?

PROSPECTIVE JUROR 281: That's it

THE COURT: Okay Anyone else have an issue? Juror 299

PROSPECTIVE JUROR 299: Yes, I have court August 15th for disorderly conduct and depending on what happens on that day, I will miss days.

THE COURT: Do you know what that is scheduled for -- what type of a hearing that is scheduled for on August 15th?

PROSPECTIVE JUROR 299: No

THE COURT: Is it your court date?

PROSPECTIVE JUROR 299: Yes

THE COURT: You don't know what it's scheduled for?

PROSPECTIVE JUROR 299: Disorderly conduct

THE COURT: Is it in City Court?

PROSPECTIVE JUROR 299: Municipal Court

THE COURT: Is it the City of Phoenix?

PROSPECTIVE JUROR 299: Tempe

THE COURT: Tempe So did you get like a summons or something that tells you to appear at a certain time and date?

PROSPECTIVE JUROR 299: Yes

THE COURT: Did it say what it was for --

PROSPECTIVE JUROR 299: Fighting

THE COURT: Okay If that was moved to a different day, would that impact you at all?

PROSPECTIVE JUROR 299: No

THE COURT: Any other reason?

PROSPECTIVE JUROR 299: No

THE COURT: All right. Thank you, sir.

Pages 15 through 37 omitted.

MR. MARTINEZ: Number 299

THE COURT: Before we leave Juror number 291

Juror 291, did you say that that page you didn't see to answer it or --

PROSPECTIVE JUROR 291: I apologize, when I got --

THE COURT: Did you -- I'm sorry Did you say that you did not see page number 11?

PROSPECTIVE JUROR 291: No I realized that after I left that day, I knew what the answer was, I just didn't fill it out because I wasn't sure how to word --

THE COURT: Did you get a chance to look at the list of names there and determine whether or not you knew any of those names on that list?

PROSPECTIVE JUROR 291: No

THE COURT: Did you look at those names?

PROSPECTIVE JUROR 291: I looked at the names and none of them are familiar to me

THE COURT: All right Thank you

MR. MARTINEZ: 299?

PROSPECTIVE JUROR 299: Yes

MR MARTINEZ: One of the things that you told us was you had a court date?

PROSPECTIVE JUROR 299: Yes

MR MARTINEZ: It appears that you've been charged, right?

PROSPECTIVE JUROR 299: I guess so, yes

MR MARTINEZ: Well, you're going to have to appear in court, right?

PROSPECTIVE JUROR 299: Yes

MR. MARTINEZ: And you are charged, right?

PROSPECTIVE JUROR 299: Yes

MR. MARTINEZ: And which town?

PROSPECTIVE JUROR 299: Tempe

MR. MARTINEZ: Tempe? And do you mind telling me what happened?

PROSPECTIVE JUROR 299: I got arrested for fighting, but I didn't get in a fight so I didn't want to sign the ticket so I got arrested and I just got a court date

MR MARTINEZ: Were you a little bit more -- I don't mean to pry too much but were you --

PROSPECTIVE JUROR 299: Intoxicated?

MR MARTINEZ: Yeah, because previously you indicated that you had a DUI involving -- or after the ASU/U of A game, right?

PROSPECTIVE JUROR 299: Yes

MR. MARTINEZ: How about this time, were

you intoxicated on that date?

PROSPECTIVE JUROR 299: Yes

MR MARTINEZ: And in this particular case, what is your version of events?

PROSPECTIVE JUROR 299: It's for fighting but I didn't get in a fight

MR MARTINEZ: You were not fighting with anyone?

PROSPECTIVE JUROR 299: No

MR. MARTINEZ: I think you said it's disorderly conduct?

PROSPECTIVE JUROR 299: Yes

MR MARTINEZ: And so -- and you think that disorderly conduct means fighting?

PROSPECTIVE JUROR 299: Well, it says disorderly conduct and then in quote it says, fighting, and I didn't get in a fight

MR MARTINEZ: Which illustrates a point that the Judge brought out There is probably going to be a police officer that's going to be testifying in your case, probably

PROSPECTIVE JUROR 299: Yes

MR MARTINEZ: Because they were the ones that arrested you, right?

PROSPECTIVE JUROR 299: Yes.

MR MARTINEZ: One of the things that's in your mind right now, as we're talking about it, is that that officer lied, right? That's what you're saying to me right now, right?

PROSPECTIVE JUROR 299: Sure, yes

MR MARTINEZ: And so as you sit there, you're -- at least as to the Tempe Police Department, which is an east-side agency, you're saying police officers, at least this one, cannot be trusted, right?

PROSPECTIVE JUROR 299: Sure

MR MARTINEZ: With regard to that mind set, do you think that whatever it is that you're going through right now, do you think that it would be something that -- and is this something that you feel strongly about? I sort of get that sense

PROSPECTIVE JUROR 299: No

MR MARTINEZ: So you don't care if you're convicted of disorderly conduct based on what an officer says?

PROSPECTIVE JUROR 299: No

MR MARTINEZ: Do you not believe it's a -- the way you're describing it to me, a miscarriage of justice?

PROSPECTIVE JUROR 299: Yes, it is.

MR MARTINEZ: And you don't feel strongly about that?

PROSPECTIVE JUROR 299: Not really

MR MARTINEZ: Not really? The issue of alcohol -- if there is an issue indicating that alcohol was involved in this particular case, are you going to side with the person that was using the alcohol, or are you going to, given what you've told me, are you going to then look perhaps to the other side, the law enforcement side, if that's in fact what's going on here, and say, well, I know my case, I know what happened there, I think that just because of my experience, you know, I don't know if I can believe those cops?

PROSPECTIVE JUROR 299: No

MR MARTINEZ: You're going to be able to set all of that aside?

PROSPECTIVE JUROR 299: Yes

MR. MARTINEZ: And there is nothing about what has happened with your case that is going to leave a bad taste in your mouth?

PROSPECTIVE JUROR 299: No

MR MARTINEZ: So you have no problem with that then? What if you were -- because you do have the DUI, what if you were going to be incarcerated as

a result of this, would that kind of leave you with a bad taste in your mouth about police or anything?

PROSPECTIVE JUROR 299: I guess so

MR MARTINEZ: One of the funny things about this, and the Judge will tell you, is that when -- you know, that may work out there but when we say, I guess so, in the courtroom, the law really doesn't allow us to stop there We have to make sure, and if the Judge were asking you these questions she would say to you, well -- not exactly in these words, but we need to know what's inside your mind because obviously we're not allowed to guess

Do you think that that would affect you, this situation?

PROSPECTIVE JUROR 299: No

MR MARTINEZ: Okay. Number 287

PROSPECTIVE JUROR 287: Yes

MR MARTINEZ: You were the person that we were going to talk to in private, correct?

PROSPECTIVE JUROR 287: Yes

MR MARTINEZ: Number 279

PROSPECTIVE JUROR 279: Yes.

MR MARTINEZ: Sir, the question about number 24, I believe you served as a judge in the

Pages 44 through 115 omitted.

habit, sorry No, not necessarily

MR BROWN: Okay

PROSPECTIVE JUROR 291: I believe that if they do something, they should do the time I don't think you should have to give a life for it though

MR BROWN: Okay Juror number 299

PROSPECTIVE JUROR 299: Yes

MR BROWN: Mr Martinez asked you some questions about the police based on your life and your experience and your background Generally it's the same question that I asked of a number of other people

If this -- well, if it came down to a situation of determining the credibility of a police officer, you said you can set your personal experience aside Would you have a fall-back position, meaning that if there is some doubt, I'm going to go against the police officer because I know in my case this police officer wasn't believable?

PROSPECTIVE JUROR 299: No

MR BROWN: You also stated in response to a question about your beliefs about the death penalty that you believe the death penalty saves the state money?

PROSPECTIVE JUROR 299: Yes.

MR BROWN: I think one of the later questions, I think it's question 41 says that the law is that you are not to consider the cost of the death penalty or a life sentence at all in making this assessment

PROSPECTIVE JUROR 299: Yes

MR. BROWN: Do you understand that? Would your feelings about possibly saving the state money linger in your mind at all?

PROSPECTIVE JUROR 299: No

MR BROWN: And on question -- I think this is 30, about life in prison, I think it's on page 12, general feelings about a sentence of life in prison, worse than the death penalty, a lot of bad stuff can happen to you in prison and --

PROSPECTIVE JUROR 299: No one knows what happens when you die

MR BROWN: -- no one knows what happens when you die Okay, that's the question I have What did you mean by no one knows what happens when you die?

PROSPECTIVE JUROR 299: No one knows --

MR. BROWN: I mean, are you talking about the after life?

PROSPECTIVE JUROR 299: Yes.

MR BROWN: Okay When you are making this assessment, and, again, everyone has their own beliefs, religious, philosophical, whatever, but when you're making this assessment, based on the evidence, whether life or death is the appropriate penalty, can you remove whatever beliefs you have about what's ultimately going to happen to someone after death, from your mind at all --

PROSPECTIVE JUROR 299: Yes

MR BROWN: I mean totally?

PROSPECTIVE JUROR 299: Yes

MR BROWN: One second You indicated on your questionnaire that you are not employed?

PROSPECTIVE JUROR 299: That's correct

MR BROWN: Can you tell us that this isn't going to be a situation where August 1st you're going to say, hey, I just found a job after x amount of weeks or x amount of months --

PROSPECTIVE JUROR 299: I go back to work September 24th

MR BROWN: Okay

PROSPECTIVE JUROR 299: I go back to work on September 24th.

MR BROWN: Okay I don't have any other questions.

Pages 119 through 127 omitted.

my brother and I just think about -- and that's what bothers me, it's just bringing up those old memories

THE COURT: Okay And the two of you had no other questions regarding the questionnaire?

MR MARTINEZ: I did not

MR BROWN: No, Judge

THE COURT: All right Thank you very much You can go ahead and step outside

PROSPECTIVE JUROR 287: Okay

THE COURT: And we'll be with you shortly

(Whereupon, Juror number 287 was excused from the courtroom.)

THE COURT: We are outside the presence of our jury panel I'll tell you my inclination is to strike Jurors numbers 281 and 246 for cause

Any argument on those two?

MR MARTINEZ: Not from me, no

MR BROWN: I was going to move to strike those two as well

THE COURT: Okay So Jurors number 281 and 246 will be struck for cause, along with the one that we struck this morning, 242

Any others that you want to argue about?

MR MARTINEZ: I would ask that you strike 299. It was pretty disturbing to have this

individual say that even though he felt that it was an injustice that he would be put in jail or in prison, depending on what it was, that he would have no feelings about it

The fact that this individual --

THE COURT: Well, I think he finally did say that he would have some feelings about it but --

MR MARTINEZ: Well, the record is pretty clear, whatever he said, but it appeared that he said that even if that were to happen, even if it were an injustice, that he would be okay with it, I think is the way that he said it

Basically what this individual is saying is that he would be okay with a lie, and I think that that disqualifies him for cause as a juror I know the record speaks for itself, but that's what my argument is

THE COURT: Mr Brown?

MR BROWN: I don't disagree it was disturbing and we don't oppose a motion to strike him

THE COURT: Okay Juror number 299 will be struck for cause

MR. MARTINEZ: The other one that I would ask you to consider is 268, and it's not for cause

Pages 130 through 140 omitted.

APPENDIX – J –

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,	)	
	)	
Plaintiff,	)	
	)	CR-12-0359-AP
vs	)	CR2001-092032(A)
	)	
SHAWN P LYNCH,	)	
	)	
Defendant	)	
	)	

BEFORE THE HONORABLE KAREN L O'CONNOR

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Phoenix, Arizona
July 17, 2012

(Original)

By: Lori Fraley
Certified Reporter
AZ CR No: 50331

APPEARANCES:

For the Plaintiff — MR. JUAN MARTINEZ, Attorney at Law

For the Defendant — MR. LAWRENCE BLIEDEN, Attorney at Law

MR JOEL BROWN, Attorney at Law

BEFORE THE HONORABLE KAREN L O'CONNOR

*****

Phoenix, Arizona

July 17, 2012

THE COURT: We're on the record in State v Lynch, outside the presence of our jury panel

Mr Brown, you may proceed

MR BROWN: Part of it, Mr Martinez said he requested that the first paragraph, I think it's on page ten, be deleted We said we opposed that We've had more time to think about it, we agree with that, that's fine

THE COURT: Well, I kept it in and we've already had it copied and so based upon your statements in the e-mail, if you want -- I changed the wording as you suggested.

MR. BROWN: Well, it's not exactly -- it's

sort of splitting fences now

THE COURT: We'll get that changed

Are we ready for the jury to come in?

MR. MARTINEZ: Yes

(Whereupon, the jury panel was present in the courtroom.)

THE COURT: This is time for the completion of our jury selection process.

We are back on the record in CR2001-092032, the State of Arizona v Shawn Patrick Lynch The record will reflect the presence of Jurors numbers 1, 3, 8, 9, 19, 31, 32, 34, 36, 37, 42, 43, 49, 61, 62, 68, 83, 97, 107, 117, 125, 130, 139, 168, 176, 215, 218, 228, 247, 255, 263, 266, 268, 271, 278, 279, 284, 287 and 291

The record will also reflect the presence of counsel and Mr Lynch

All right Ladies and gentlemen, this is the time for the attorneys to decide which of you will serve on this jury Before they make their final selections I have a few more questions for all of you.

First, I want you all to look around the room at each other and see if you know anyone -- if you know any other member on this jury panel. Anyone

look familiar? Anyone you work with, live nearby, a family member, husband, wife?

All right And just to make sure that I haven't overlooked anyone who may still have practical issues if they are selected to serve on this jury, is there anyone here who still has any conflict with the trial schedule?

Juror number 278 All right Sir, what is the --

PROSPECTIVE JUROR 278: I spoke with my employer last night about the schedule and he knew about it but work is starting to become really overwhelming We are going to have to start working seven days a week and it's a real small company, about eight people, and if I can't be there pretty much every day the company is going to be impacted pretty hard.

THE COURT: Can you tell me if this is a personal hardship on you or is this a hardship on your company?

PROSPECTIVE JUROR 278: It would be both

THE COURT: Tell me how it affects you personally

PROSPECTIVE JUROR 278: I'd have to go in at 4:00 in the morning until I come here and then I

would have to go back to work when I get out of here

THE COURT: All right Thank you, sir

Is there anyone else? Okay.

Is there anyone here who has a health problem that feels that it is significant enough that you feel that you can't serve on this jury?

Is there anyone who has any other reason that you think that there may be an issue with serving on this jury?

All right, Juror number 31

PROSPECTIVE JUROR 31: Your Honor, may I speak with the Court in private?

THE COURT: Sure

Anyone else?

Is there anyone here who has talked about the case to anyone or has done any research on the case?

Has anyone looked up the case on the internet? Or anything of that nature?

Is there anything else that you think the attorneys or I should know about you before being selected as jurors on this case? In other words, is there something that we didn't ask you but you think that we should have asked a question, you think you have something to tell us that is very important but

we just didn't ask the right question?

All right Can I see counsel for a minute?

(Whereupon, the following bench conference was held on the record:)

THE COURT: I'm going to go ahead and excuse 278; all right?

MR MARTINEZ: Okay

THE COURT: The other thing is, I -- what I'm going to anticipate is excusing the rest of the jurors, talking to Juror number 31, and then making -- have you guys make your strikes for cause

So do you pass the panel for cause at this time, Mr Martinez?

MR. MARTINEZ: Yes

MR. BROWN: Yes

THE COURT: With the exception of possibly Juror number 31?

MR. BROWN: Yes

MR. MARTINEZ: Yes

THE COURT: Now, you don't need any more time to look at who you are talking about before you make your strikes?

MR MARTINEZ: No, we're done with the questioning

MR. BROWN No.

THE COURT: You don't need them to be brought back in?

MR BROWN: Right

MR MARTINEZ: No

THE COURT: All right Thanks

(Whereupon, the bench conference concludes)

THE COURT: Ladies and gentlemen, at this time I'm going to have everyone except for Juror number 31 leave the courtroom And we will get back to you as quick as we can The attorneys are going to be making their final strikes and I think that process should take about 20 minutes -- 30 minutes

MR BROWN: At least 30 minutes

THE COURT: If you want to go downstairs and have a cup of coffee or something while you're waiting you're welcome to do so, I would just ask you to be back here at around 11:30 or so; okay? Thank you

(Whereupon, the jury panel was excused from the courtroom.)

THE COURT: We are outside the presence of the other jury panel members We have Juror number 31

PROSPECTIVE JUROR 31: Yes, ma'am.

THE COURT: I told you it wasn't going to be a totally private situation but go ahead and tell us what you would like to tell us, sir

PROSPECTIVE JUROR 31: I don't feel that I'm mentally or emotionally mature enough to be on a jury like this

THE COURT: Is this something that you just came to realize within the last few days?

PROSPECTIVE JUROR 31: Yes, within the last few weeks, Your Honor I apologize for wasting the Court's time but --

THE COURT: There is no reason to apologize Is there something that happened that makes you feel that you can't serve on this case?

PROSPECTIVE JUROR 31: I just have been pretty much overwhelmed with thinking about it and I don't believe I'm able to make any kind of a decision

THE COURT: All right Thank you, sir

Counsel, do you have any follow-up questions for Juror 31?

MR. MARTINEZ: I do not

MR. BROWN: No

THE COURT: Sir, you can go ahead and step outside. Thank you

(Whereupon Juror 31 was excused from the courtroom)

THE COURT: Is there any objection to striking Juror number 31 --

MR MARTINEZ: No

MR BROWN: No

THE COURT: -- for cause? Thank you

Juror 31 and Juror number 278 will be struck for cause

All right, we will see you -- let me know when you are finished with your strikes; okay

MR MARTINEZ: That takes us to 287; correct?

THE COURT: Is that with four alternates?

MR MARTINEZ: Right, 12 plus four

MR BROWN: I think that's right There are 37 people now

MR MARTINEZ: Right

MR. BROWN: And so the last one would be below the line

THE COURT: All right

MR. MARTINEZ: All right

(Whereupon a short recess was taken)

THE COURT: We are back on the record outside the presence of our jury panel with counsel

and Mr Lynch present My understanding is that someone wanted to put something on the record.

MR BLIEDEN: Yes, defense would like to make a Batson challenge The reason being the State struck prospective Jurors number 32 -- let me start again Prospective jurors number 8, 32, 35, 49 and 255 And all of those people identified themselves as Hispanic in the biographical sheets

THE COURT: How many other Hispanics were on the panel, do we know?

MR BLIEDEN: I don't know Maybe a few more, at most, not many I couldn't tell you any other than these five But the fact remains that out of ten strikes, half of them were a minority and we believe that in and of itself is a prima facia case that the motivation for striking these people was not race neutral, five out of ten, 50 percent The law is clear on that and so that's the motion

THE COURT: Okay

Mr Martinez?

MR. MARTINEZ: With regard to -- I'll start with the back end and go that way Number 255, she indicated that she is philosophically opposed to the death penalty and it wouldn't matter to me if it were a Caucasian or whatever color they were, it is the

State's preference that no one that opposes the death penalty be serving and so that is a race neutral reason

I would also add that she had difficulty explaining to me on the questionnaire why it was that she believed that life was preferable to death She went back and forth and at some point said well, I really just can tell you why I believe that life is preferable to death, but she is philosophically opposed to the death penalty and that's what her questionnaire indicates

49 is a woman who on -- she has served on three prior jury panels One of them resulted in a plea agreement and -- all of this is from the questionnaire But one of those resulted in a plea agreement There was a child molestation case in which it was a hung jury and then there was a previous case, I believe it was a bribery, but in that case she also said that some of the counts were hung

I do not want this case to hang There is no doubt in the State's mind that if this juror is seated this woman will hang this jury and will, in fact, result in a victory for the defense, because as you know, we cannot retry this case.

If she is on this panel, there is no doubt, because of her previous experience, she knows what a hung jury is and she's done it on two previous occasions, so this is a person that the State, even if they were whatever ethnicity, would not allow to sit She's somebody who is unacceptable because her track record, irrespective of race, indicates that she would hang this case up and it would result in what we know will happen if it's a hung jury, a verdict of life That is a race neutral reason

I think Mr Blieden indicated number 35 There is no number 35 I did strike number 34

MR BLIEDEN: If I said 35 I meant 34

MR. MARTINEZ: 34, you will be able to see, is wearing shorts today On the left leg and on the right leg he's got tattoos On one of his arms, I believe the left arm, he has a number of tattoos on him. He has a lot of tattoos on him and one of the things that you will be hearing and I believe the date was 2003, the defendant admitted to his psychologist, Jolie Brams, who is going to testify, that this hepatitis C, which is one of the mitigating circumstances, was contracted in the jail and apparently it was, according to the defendant, he was either giving tattoos and receiving tattoos, but in

any event, it involved a tattoo that he received in jail in 2003

Again, there are -- is no other individual on this panel that has this many tattoos that are visible I do not want anybody on this panel that can identify with the defendant, again, whether -- if it were a Caucasian person, if it were Native American, I would not want anybody with all of these tattoos, especially since one of their strongest mitigating circumstances is that he contracted hepatitis C while in custody in 2003

Number 32, and I'm going to describe him. I don't mean any disrespect to him. I know he's not in the courtroom but I do want the record to reflect what we all saw It would not be an exaggeration to say that his facial hair resembles ZZ Top and being unkind I would say it looks like a billy goat

Additionally, his hair in the back is a very long ponytail and it looks like Jerry Garcia, if we're going to go with that sort of analogy There is no way that anybody that looks like ZZ Top or Jerry Garcia, in my view, whether they are white or whether they are not white should be serving, and I would have stricken anybody with that type of grooming.

I would note that one of the other people that I asked you to strike for cause was number 299 If you remember, he was here yesterday He also had long hair and facial hair That was part of the reason that I asked that he be stricken. I just do not want somebody with long hair or facial hair and he happened to be white So that is a race neutral reason

Number 8 is the woman who indicated that -- question 19, that she had a brother who was convicted of child abuse, and she was pretty unhappy because he did not have a lawyer and we went -- and I spoke to her about that and she indicated, well, that was just the way he was, but somebody who is close to her was convicted of child abuse

As you know, one of the mitigating circumstances here, it's laid out in the preliminary instructions, is the defendant's past There are going to be allegations that there was some sort of abuse early on, perhaps a priest may have done something to him. There is that sort of allegation that's going on

There is also a lot of sexual innuendo involved in this case For example, when he was in high school he indicated that all the women wanted

was to have sex with them and he didn't want to have sex with them. The fact that somebody that is very close to her, a brother, was convicted of child abuse is -- and that there was the added indication that he did not have the lawyer with implication -- it wasn't even an implication, it was the prosecution basically took advantage of him. I would have stricken her had she also been white.

For those reasons I do believe that all of my strikes were race neutral and I ask that you uphold them. Thank you.

THE COURT: The Court finds that the reasons given for the State's striking Juror numbers 8, 32, 34, 49 and 255 are all race neutral and I will allow the strikes Anything further?

MR BLIEDEN: Just for the record -- we want the record to reflect that the reasons given regarding -- by the State regarding Juror numbers 32 and 34 did not cure or justify the strikes and we believe the reasons given by the State's attorney supports the contention that they were struck for reasons of ethnicity or race; that's all

THE COURT: All right

Are we ready to have the jury come in?

MR. MARTINEZ: Yes.

(Whereupon, the potential jury panel was present in the courtroom.)

THE COURT: We are back on the record with our jury panel Ladies and gentlemen, the clerk is going to read the juror numbers of the jurors that were selected to serve on this case When your number is read, please come forward and Cheryl will give you a different number and tell you where to sit up here; all right?

THE CLERK: Juror number 9, number 31 -- wait, I'm sorry, that's wrong Sorry

THE COURT: Number 31, you can go ahead and have a seat

THE CLERK: Number 36, number 43, number 68, number 107, number 125, number 130, number 139, number 218, number 228, number 247, number 263, number 266, number 268, number 284, number 287

THE COURT: All right Thank you

For those of you who were not selected, you are now excused as jurors -- or potential jurors in this case which means you're free to leave I want to thank you very much for your service We could not have gone through this jury selection process without you and Cheryl will have --

THE BAILIFF: Claudia has slips for them.

THE COURT: If you need a slip for your employer to tell them where you were today Claudia will be able to get those for you Thanks very much You are now free to leave

For the rest of you, I'm going to have you all stand at this time, raise your right hands and be sworn in as jurors in this case

(Whereupon, the jury panel was placed under oath)

THE COURT: All right Thank you

Ladies and gentlemen, we are going to be in recess until 1:30 At 1:30 we're going to come back We will start up with -- I will give you some preliminary instructions and we'll start with trial The attorneys will be giving you their opening statements

So, we will see you back here at 1:30 Please do not talk about the case with anyone Do not let anyone talk with you about the case Do not do any research about the case; all right? We'll see you back here at 1:30

(Whereupon the jury panel was excused from the courtroom)

THE COURT: Anything for the record before we recess? I want to talk to you informally about

Pages 18 through 117 omitted.

APPENDIX – K –

MICHAEL K. JEANES, CLERK
BY ____ DEP
FILED

2005 SEP 22 PM 4:57

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Attorney for Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, vs **SHAWN PATRICK LYNCH (A),** Defendant	No. CR 2001-092032 **MOTION TO PRECLUDE TESTIMONY CONCERNING AVAILABILITY OF PAROLE** (Assigned to the Honorable David M. Talamante Div Crj20)

The State of Arizona, by and through the undersigned Deputy County Attorney, requests that the court preclude evidence or argument claiming there is no possibility of parole under Arizona law.

Because there remain multiple avenues for defendants convicted of First Degree Murder to seek release after serving

the requisite 25 years, defendants should not be permitted to present any testimony or argument claiming that under current Arizona law there is no parole. Instead, the jury should be advised of the three possible sentences facing this defendant, ie. death, natural life and life.

Submitted this 22 day of Sept, 2005.

ANDREW P THOMAS
MARICOPA COUNTY ATTORNEY

By Juan Martinez
Juan Martinez
Deputy County Attorney

Copy of the foregoing
mailed\delivered this
22 day of Sept, 2005 to:

The Honorable David M. Talamante
Judge of the Superior Court

Joel Brown
Deputy Public Defender
11 West Jefferson, Ste 5
Phoenix, Arizona 85003
Attorney for Defendant

BY Juan Martinez
Juan Martinez
Deputy County Attorney

JM/ir

APPENDIX – L –

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 2001-092032 10/18/2005

HONORABLE DAVID M. TALAMANTE

CLERK OF THE COURT
B. Giles
Deputy

FILED: 11/02/2005

STATE OF ARIZONA JUAN M MARTINEZ

v.

SHAWN PATRICK LYNCH (A) JOEL T BROWN
ROBERT D STEIN

VICTIM SERVICES DIV-CA-SE

TRIAL MANAGEMENT CONFERENCE

9:08 a.m.

State's Attorney:	Juan M. Martinez
Defendant's Attorney:	Robert D. Stein
	Joel T. Brown
Defendant:	Present
Court Reporter:	Jane Westlund

Defendant's Motion For Second Rule 11 Examination is argued to the Court.

For the reasons set forth on the record,

IT IS ORDERED denying Defendant's Motion For Second Rule 11 Evaluation.

With respect to Defendant's Motion To Dismiss the State's Notice Of Intent And Notice Of Aggravating Factors,

For the reasons set forth on the record,

IT IS ORDERED denying Defendant's Motion To Dismiss.

With respect to Defendant's Motion To Hold Arizona Death Penalty Unconstitutional,

For the reasons set forth on the record,

IT IS ORDERED denying Defendant's Motion.

With respect to State's Motion To Preclude Argument Regarding Proportionality Review,

The Court makes no ruling at this time. A ruling will abide the Penalty Phase of trial.

With respect to State's Motion Regarding Sympathy During Penalty Phase,

For the reasons set forth on the record,

IT IS ORDERED granting State's Motion Regarding Sympathy During Penalty Phase.

With respect to State's Motion To Preclude Evidence Regarding Residual Doubt,

The Court makes no ruling at this time. A ruling will abide the Penalty Phase of trial.

With respect to State's Motion To Preclude Questioning of Jurors Regarding Mitigating and Aggravating Factors,

IT IS ORDERED granting State's Motion To Preclude Questioning of Jurors Regarding Mitigating and Aggravating Factors.

With respect to State's Motion To Preclude Evidence Regarding Future Prison Conditions,

For the reasons set forth on the record,

IT IS ORDERED granting State's Motion To Preclude Evidence Regarding Future Prison Conditions.

With respect to State's Motion To Instruct the Jury Regarding Weighing Factors,

The Court will hold in abeyance any ruling until the Penalty Phase of trial.

With respect to State's Motion To Instruct Jury Regarding Defendant's Burden of Proof,

The Court will hold in abeyance any ruling until the Penalty Phase of trial.

With respect to State's Motion Allowing State To Comment On Defendant's Allocution,

IT IS ORDERED granting State's Motion Allowing State To Comment On Defendant's Allocution.

With respect to State's Motion To Present Rebuttal To Mitigation.

IT IS ORDERED granting State's Motion generally, but will have to hear mitigation at Penalty Phase.

With respect to State's Motion To Preclude Testimony Concerning Availability Of Parole,

IT IS ORDERED granting State's Motion To Preclude Testimony Concerning Availability Of Parole.

With respect to Defendant's Motion Pursuant to Rule 16 Challenging The Allegation Of Aggravating Circumstances Filed By The State,

IT IS ORDERED denying Defendant's Motion Pursuant to Rule 16 Challenging The Allegation of Aggravating Circumstances Filed By The State.

With respect to Defendant's Motion In Limine Of Alleged Armed Robbery Of 03/24/2001,

IT IS ORDERED taking this matter under advisement.

With respect to Defendant's Motion To Preclude Use of Terms "Aggravating Phase" In Presence of Jurors,

IT IS ORDERED taking this matter under advisement.

With respect to trial schedule,

IT IS ORDERED directing that counsel provide their schedules to the Court's Judicial Assistant.

LET THE RECORD REFLECT the jury selection and trial schedule will begin at 1:00 p.m. each day and end at 5:00 p.m., Monday through Thursday.

With respect to Defendant's Motion For Jury Determination Of Edmund/Tison Finding And Jury Instruction,

The Court will consider the State's Response and rule.

With respect to Defendant's Motion To Strike The Allegation Of Especially Heinous, Cruel And Depraved,

IT IS ORDERED taking this matter under advisement.

Discussion held among Court and counsel regarding jury questionnaires, as set forth on the record.

Defendant's Pro Per Motion For Change Of Counsel is argued to the Court.

The Court advises the Defendant that he may provide the Court with a written motion for the Court consideration.

With respect to Defense counsel's objection to the victim's brother claim of being a victim under Victim Rights and his refusal to be interviewed,

IT IS ORDERED directing Defense counsel to provide a written request by the end of today and the State is ordered to respond within 2 days.

IT IS ORDERED that counsel meet with the Court on **10/25/2005 at 10:30 a.m.** for any remaining issues.

IT IS FURTHER ORDERED affirming the Firm Trial date of **10/25/2005 at 10:30 a.m.** in this Division.

IT IS ORDERED that no time be excluded. LAST DAY REMAINS: 12/26/2005.

IT IS FURTHER ORDERED affirming prior custody orders.

10:17 a.m. Matter concludes.

APPENDIX – M –

2008 WL 6587570 (Ariz.) (Appellate Brief)
Supreme Court of Arizona.

STATE OF ARIZONA, Appellee,

v.

Shawn Patrick LYNCH, Appellant.

No. CR 06-0220-AP
December 8, 2008.

Maricopa County Superior Court No. CR 2001-092032

Appellant's Opening Brief

David Goldberg, Esq. ABN 012726, PO Box 608, Fort Collins, CO 80522, (970) 482-7171, (928) 779-7171/606-1618, beardog1960@msn.com, Attorney for Appellant.

*iii TABLE OF CONTENTS

ISSUES PRESENTED i
TABLE OF AUTHORITIES vii
JURISDICTION 1
STATEMENT OF THE CASE 1
PROCEDURAL HISTORY 2
FACTS 7
ARGUMENT 17
1. Appellant's convictions and sentences are void and violate his right to due process since he was incompetent. The trial court abused its discretion by failing to hold a competency hearing and order an evaluation after his counsel alerted the court that his client had decompensated and was now delusional and no longer competent 17
2. The trial court abused its discretion by limiting the form, scope, and length of voir dire at both trials. Appellant was deprived of his right to an impartial jury under the Sixth Amendment 24
A. The trial court's limitations on voir dire and refusal to permit individual voir dire deprived Appellant of an impartial jury during his first trial 26
B. The trial court's limitations on voir dire deprived Appellant of an impartial jury during his second trial 27
3. The trial court's rulings during voir dire violated Appellant's rights under the Sixth and Fourteenth Amendments during both jury trials 30
A. The trial court erroneously struck juror 119 from Appellant's first trial jury 31
B. The trial court erroneously struck jurors 25 and 49 from Appellant's second trial jury 32
*iv 4. The trial court abused its discretion and denied Appellant a fair trial when it admitted irrelevant gruesome photographs during both trials 34
5. The failure to instruct the jury on the lesser included offense of second degree murder was structural error 38
6. The (F)(6) aggravator jury instruction was incomplete and improperly reduced the State's burden of proof. The jury instructions failed to adequately define and narrow the facially vague terms "especially heinous or depraved" in violation of the Eighth and Fourteenth Amendments 41
7. The failure to instruct the first jury that it could not vicariously find Appellant responsible for the (F)(6) aggravator was fundamental error 44
8. The jury instructions defining the Enmund/Tison predicate were incomplete and inaccurate in violation of the Eighth and Fourteenth Amendments 47
9. The State failed to prove to either jury that Appellant qualified for the death penalty under Enmund and Tison 49

10. The State failed to prove beyond a reasonable doubt to either jury the (F)(5) and (F)(6) aggravating circumstances 51
A. The State failed to prove that the murder was especially cruel 52
B. The State failed to prove that the murder was especially heinous or depraved 55
C. The State failed to prove that Appellant's motive for the murder was pecuniary gain 58
11. Arizona's death penalty scheme violates the Eighth and Fourteenth Amendments by not requiring that once a defendant proves mitigating circumstances exist that the State proved beyond a reasonable doubt that the mitigation is not sufficiently substantial to call for leniency and that death is the appropriate sentence 61
*v 12. Appellant's rights not to be subject to double jeopardy, fundamental fairness and due process and Arizona law were violated when the court permitted the State to retry the (F)(5) aggravator, the depraved prong of the (F)(6) aggravator and whether Appellant was the killer and acted intentionally .. 65
A. Retrial of the (F)(5) and (F)(6) depravity aggravators was prohibited by statut 67
B. Retrial of the (F)(5) and (F)(6) depravity aggravators was a violation of the Fifth and Fourteenth Amendments. 69
C. Retrial of the Enmund/Tison issue was a violation of the Fifth and Fourteenth Amendments. 71
D. The State waived its right to argue that Appellant intentionally murdered the victim 74
13. The trial court abused its discretion and violated Appellant's rights under the Eighth and Fourteenth Amendments when it precluded all evidence of future prison conditions, life imprisonment and lack of future dangerousness 75
14. The second penalty jury's death sentence is now void since it failed to find beyond a reasonable doubt the cruel and heinous prongs of the (F)(6) aggravator and the Enmund/Tison predicate 78
15. The trial court violated Appellant's rights to due process and to not to be subject to double jeopardy when it instructed the jury that it could consider the cruel, heinous or depraved prongs of the (F)(6) aggravator as three separate aggravating circumstances. 81
16. The jury instruction that inadequately and inaccurately set forth the jury's mitigation assessment reduced the State's burden of proof and was structural error 86
17. Appellant was deprived of his right to due process as a result of the cumulative affect of the State's prosecutorial misconduct 90
A. Objected to misconduct pervaded Appellant's trials. 91
*vi B. Unobjected to misconduct also pervaded Appellant's trials 97
18. This Court should vacate Lynch's death sentence upon independent review 101
A. The evidence regarding the State's alleged aggravating circumstances and Enmund/Tison predicate is subject to doubt and should if upheld should be given minimal weight 103
B. Appellant's proven mitigation is sufficiently substantial to warrant a life sentence 104
1. Appellant has low intelligence functioning 104
2. Appellant suffer from PTSD and Paranoid and Delusional Personality Disorders 105
3. Appellant came from a dysfunctional family that led to his own drug abuse and dysfunction 105
4. Appellant served his country in the Marines 106
5. Appellant is a skilled artist 106
6. Appellant has family love and support and his execution will impact his family 107
7. Appellant was convicted of felony murder and there is a reasonable doubt as to whether he killed the victim 107
8. Appellant's death sentence is disproportionate to his codefendant's life sentence 108
CONSTITUTIONAL CHALLENGES TO THE DEATH SENTENCE RAISED AND PRESERVED FOR FUTURE FEDERAL REVIEW 109
CONCLUSION 115
CERTIFICATE OF SERVICE 116
CERTIFICATE OF COMPLIANCE 116

*vii TABLE OF AUTHORITIES

SUPREME COURT CASES

Adams v. Texas, 448 U.S. 38 (1980) 33
Apprendi v. New Jersey, 530 U.S. 466 (2000) ..... passim
Arizona v. Rumsey, 467 U.S. 203 (1984) 69
Ashe v. Swenson, 397 U.S. 436 (1970) 69, 70
Atkins v. Virginia, 536 U.S., 304 (2002) 104
Beck v. Alabama, 447 U.S. 625 (1980) 39

Bell v. United States, 470 U.S. 856 (1985) 72
Bell v. Cone, 543 U.S. 447 (2005) 41
Bullington v. Missouri, 451 U.S. 430 (1981) 69
Burks v. United States, 437 U.S. 1 (1978) 72
Cabana v. Bullock, 474 U.S. 376 (1985) 73
Clemons v. Mississippi, 494 U.S. 738 (1990) 104
Cooper v. Oklahoma, 517 U.S. 348 (1996) 18
Drope v.Missouri, 420 U.S. 162 (1975) 18
Darden v. Wainwright, 477 U.S. 168 (1986) 31
Dusky v. United States, 362 U.S. 402 (1960) 18
Enmund v. Florida, 458 U.S. 782 (1982) 5, 47
Godfrey v. Georgia, 446 U.S. 420 (1980) 43
Gregg v. Georgia, 428 U.S. 153 (1976) 42, 110
Hicks v. Oklahoma, 447 U.S. 343 (1980) 82
In re Snow, 120 U.S. 274 (1887) 72
In re Winship, 397 U.S. 358 (1970) 52
Kansas v. Marsh, 548 U.S. 163 (2006) 63, 64
Kelly v. South Carolina, 534 U.S. 246 (2002) 77
Lockett v. Ohio, 438 U.S. 586 (1978) 46
Lowenfield v. Phelps, 484 U.S. 231 (1988) 55
Maynard v. Cartwright, 486 U.S. 356 (1988) 41, 43
McCleskey v. Kemp, 481 U.S. 279 (1987) 42, 55
Mills v. Maryland, 486 U.S. 367 (1988) 86
Morgan v. Illinois, 504 U.S. 719 (1992) 24, 28
Pate v. Robinson, 383 U.S. 375 (1966) 18, 22, 24
Payne v. Tennessee, 501 U.S. 808 (1991) 96, 100
Proffitt v. Florida, 428 U.S., 242 (1976) 103
Ring v. Arizona (Ring II), 536 U.S. 466 (2002) 3, 43
Schad v. Arizona, 501 U.S. 624 (1991) 40, 67
Schiro v. Farley, 510 U.S. 222 (1994) 65
*viii *Shafer v. South Carolina*, 532 U.S. 36 (2001) 77
Simmons v. South Carolina, 512 U.S. 154 (1994) 77
Smith v. Texas, 543 U.S. 37 (2004) 104
Sullivan v. Louisiana, 508 U.S. 275 (1993) 41, 47
Taylor v. Kentucky, 436 U.S. 478 (1978) 46, 82
Tennard v. Dreke, 542 U.S. 274 (2004) 76
Tison v. Arizona, 481 U.S. 137 (1987) 5, 47
Uttecht v. Brown, U.S.__, 127 S.Ct 2218 (2007) 24
Wainwright v. Witt, 469 U.S. 412 (1985)
25, 30, 31 ..... Walton v. Arizona, 497 U.S. 639 (1990)
43, 62, 110 ..... Wiggins v. Smith, 539 U.S. 510 (2003)
Witherspoon v.Illinois, 391 U.S. 510 (1968) 30, 31
Zant v. Stephens, 462 U.S. 862 (1983) 55

FEDERAL CASES

Cartwright v. Maynard, 822 F.2d 1477 (10th Cir. 1987) 43
McMurtrey v. Ryan, 539 F.3d 1112 (9th Cir. 2008) 22, 23, 24
Styers v. Schiro, F.3d (Case No. 07-99003) (2008) th 104
Torres v. Prunty, 223 F.3d 1103 (9 Cir. 2000) 23
United States v. Brockington, 849 F.2d 872, 875 (4th Cir. 1988) 93, 98
United States v. Williams-Davis, 90 F.3d 490, 507 (D.C. Cir. 1996) 93
Valerio v. Crawford, 306 F.3d 742 (9th Cir. 2002) 49
Wade v. Calderon, 29 F.3d 1312, 1320 (9th Cir. 1994) 82

STATE CASES

Bruce v. State, 616 A.2d 392 (Myd. 1992) 77
Doering v. State, 545 A.2d 1281 (Myd. 1988) 77
Grace v. Territory, 12 Ariz. 1,94 P. 1108 (1908) 74

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In re Peasely, 208 Ariz. 27, 90 P.3d 764 (2004) 91
In re Zawada, 208 Ariz. 232, 92 P.3d 862 (2004) 90
Janson v. Christensen, 167 Ariz. 470, 808 P.2d 1222 (1991) 67
McKaney v. Foreman, 209 Ariz. 268, 100 P.3d 18, 21 (2004) 112
Nordstrom v. Cruikshank (Nordstrom III), 213 Ariz. 434, 142 P.3d 1247 (App. 2006) 79
People v. Estrada, 904 P.2d 1197 (Ca 1995) 47
People v. Proby, 60 Cal.App.4th 922, 70 Cal.Rptr.2d 706 (1998) 47
State v. Anderson (Anderson I), 197 Ariz. 314, 4 P.3d 369 (2000) 30, 31, 34
*lx *State v. Anderson* (Anderson II), 210 Ariz. 327, 111 P.3d 369 (2005) 38, 41 42, 43, 47, 50, 51, 57, 73, 82, 86, 88
State v. Andriano, 215 Ariz. 497,161 P.3d 540 (2007) 102, 113
State v. Armstrong (Armstrong.II), __Ariz.__P.3d__ (2008) . 79
State v. Arnett, 158 Ariz. 15, 760 P.2d 1064 (1988) 72
State v. Atwood, 171 Ariz. 576, 832 P.2d 593 (1992) 90, 109, 111
State v. Bible, 175 Ariz. 549, 858 P.2d 1152 (1993) 27
State v. Bishop, 162 Ariz. 103, 781 P.2d 581 (1989) 18
State v. Bocharski (Bocharski II), __Ariz.__, P.3d (2008) 57, 114
State v. Bolton, 182 Ariz. 290, 896 P.2d 830 (1995) 100
State v. Bracy, 145 Ariz. 520, 525-26, 703 P.2d 520 (1985) . 93, 98
State v. Brown, 217 Ariz. 617, 177 P.3d 878 (App. 2008) 72
State v. Cameron, 146 Ariz. 210, 704 P.2d 1355 (App. 1985) 18
State v. Canez (Canez I), 202 Ariz. 133, 42 p.3d 564 (2002) 108
State v. Carlson, 202 Ariz. 570, 48 P.3d 1180 (2002) 1, 45, 102
State v. Carreon, 210 Ariz. 54, 107 P.3d 900 (2005) 113
State v. Casey, 205 Ariz. 359, 71 P.3d 351 (2003) 65
State v. Chapple, 135 Ariz. 281, 660 P.2d 1208 (1983) 18, 38
State v. Christian, 205 Ariz. 64, 66,¶6, 66P.3d 1241 (2003) . 68
State v. Cox, 201 Ariz. 464, 37 P.3d 437 (App. 2002) 78
State v. Cromwell, 211 Ariz. 181, 119 P.3d 448 (2005) 111
State v. Cruz, 175 Ariz. 395, 857 P.2d 1249 (1993). 109
State v. Cruz, 189 Ariz. 29, 938 P.2d 78 (App. 1996) 75
State v. Cruz, 218 Ariz. 149, 181 P.3d 196 (2008) 76, 114
State v. Dann (Dann I), 205 Ariz. 557, 74 P.3d 231 (2003) .. 112
State v. Davenport, 675 P.2d 1213 (Wa. 1984) 101
State v. Doerr, 193 Ariz. 56, 969 P.2d 1168 (1998) 52, 106
State v. Dunlap, 187 Ariz. 441, 930 P.2d 518 (App. 1996) ... 90
State v. Ellison, 213 Ariz. 116, 140 P.3d 899 (2006) 30, 55, 108, 112, 113
State v. Fulminante, 161 Ariz. 237, 778 P.2d 602 (1988) 110
State v. Garza, 216 Ariz. 56, 163 P.3d 1006 (2007) 114
State v. Gerlaugh (Gerlaugh I), 134 Ariz. 164, 654 P.2d 800 (1982) 38
State v. Gillies, 135 Ariz. 500, 662 P.2d 1007 (1983) 54
State v. Glassel, 211 Ariz. 33,116 P.3d 1193 (2005) 17, 38, 41, 47, 63 82, 86, 113
State v. Gonzales; 105 Ariz. 434, 466 P.2d 88 (1970) 90
State v. Gonzales, 182 Ariz. 502, 892 P.2d 838 (1995) 107
State v. Govan, 154 Ariz. 611, 744 P.2d 712 (App. 1987) 39
State v. Greene, 192 Ariz. 431, 967 P.2d 106 (1998) 102
State v. Greenway, 170 Ariz. 151, 823 P.2d 22 (1991) 111
*x *State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1 (1983) 69
State v. Gulbrandson, 184 Ariz. 46, 906 P.2d 579 (1995) 63, 106, 110, 112
State v. Hampton, 213 Ariz. 167, 140 P.3d 950 (2006) 34, 43, 44

State v. Harrod (Harrod III), 218 Ariz. 268, 183 P.3d 519 (2008) 114
State v. Henderson, 210 Ariz. 561, 115P.3d 601 (2005) 44
State v. Hinchey, 181 Ariz. 307, 890 P.2d 602 (1995) 110
State v. Hughes, 193 Ariz. 72, 969 P.2d 1184 (1998) 90, 94, 99
State v. Hyde, 186 Ariz. 252, 921 P.2d 655 (1996) 58
State v. Isa, 850 S.W.2d 876, 902-03 (Mo. 1993) 46
State v. Jimenez, 130 Ariz. 138, 634 P.2d 950 (1981) 70
State v. Johnson, 212 Ariz. 425, 133 P.2d 735 (2006) 24, 25, 41, 106, 110, 114
State v. Jones, 185 Ariz. 471, 917 P.2d 200 (1996) 106
State v. Kayer, 194 Ariz. 423, 984 P.2d 31 (1999) 24, 31
State v. King, 180 Ariz. 268, 883 P.2d 1033 (1994) 96
State v. Krone, 182 Ariz. 319, 897 P.2d 621 (1995) 41
State v. Lacy, 187 Ariz. 340, 929 P.2d 1288 (1996) 2, 51
State v. Lavers, 168 Ariz. 376, 814 P.2d 333 (1991) 106
State v. Lee, 110 Ariz. 357, 360, 519 P.2d 56, 59 (1974) 93
State v. Lehr, 205 Ariz. 107, 67 P.3d 703 (2003) 86
State v. Mann, 188.Ariz. 220, 934 P.2d 784 (197)..... 52, 108
State v. Marlow, 163 Ariz. 65, 786 P.2d 395 (1989) 108
State v. Mata, 125 Ariz. 233, 609 P.2d 48, 57 (1980) 110
State v. McGill, 213 Ariz. 147, 140 P.3d 930 (2006) 61, 78
State v. McMurtrey, 136 Ariz. 93, 664 P.2d 637 (1983) 105
State v. Medina, 193 Ariz. 504, 975 P.2d 94 (1999) 58, 85
State v. Miles, 186 Ariz. 10, 918 P.2d 1028 (1996) 62, 85, 110
State v. Milke, 177 Ariz. 118, 865 P.2d 779 (1993) 61
State v. Miller, 186 Ariz. 314, 921 P.2d 1097 (1994) 85
State v. Miranda, 200 Ariz. 67, 22 P.3d 506 (2001) 39
State v. Moody, 208 Ariz. 424, 94 P.3d 1119 (2004) 19, 54
State v. Morris, 215 Ariz. 430, 160 P.3d 203 (2007) 95
State v. Munninger, 209 Ariz. 473, 104 P.3d 193 (App. 2005) 86
State v. Newell, 212 Ariz. 389,132 Ariz. 833 (2006) 94, 98, 104
State v. Norten, 99 Ariz. 116, 407 P. 2d 81 (1965) 74
State v. Ontiveros, 206 Ariz. 539, 81 P.3d 330 (2003) 65
State v. Palenkas, 188 Ariz. 201, 933 P. 2d 1269 (App 1996) 74
State v. Pandeli (Pandeli I), 200 Ariz. 365, 26 P.3d 1136 (2001) 57
State v. Pandeli (Pandeli IV), 215 Ariz. 514, 161 P.3d 1247 (2007) 76, 79, 104
State v. Phillips, 156 P.3d 583 (Idaho App. 2007) 101
State v. Prince, 206 Ariz. 24, 75 P.3d 114 (2003) 54
*xi *State v. Rayes*, 206 Ariz. 58, 75 P.3d 148 (App. 2003) . 65
State v. Ring (Ring III), 204 Ariz. 534, 65 P.3d 915 (2003) .. 58, 107, 1 12
State v. Rodriguez 198 Ariz. 139, 7 P.3d 148 (App. 2000) 70
State v. Roque, 213 Ariz. 193, 141 P.3d 368 (2006) 91, 115
State v. Roscoe, 184 Ariz. 484, 910 P.2d 635 (1996) 106
State v. Roseberry, 210 Ariz. 360, 111 P.3d 402 (2005) 102, 113
State v. Salazar, 173 Ariz. 399, 844 P.2d 566 (1992) 110
State v. Saning 200 Ariz.347, 26 P.3d 1118 (2001) 58 61
State v. Schackart, 190 Ariz. 238; 947 P.2d 315 (1997) 53
State v. Serna, 163 Ariz. 260, 787 P.2d 1062 (1990) 97, 101
State v. Sharp, 193 Ariz. 414, 973 P.2d 171 (1999) 40
State v. Soto-Fong, 187 Ariz. 186,928 P.2d 610 (1996) 53, 54
State v. Spreitz, 190 Ariz. 129, 945 P.2d 1260 (1997) 37, 52
State v. Steelman, 120 Ariz. 301, 585 P.2d 1213 (1978) 19
State v. Stokley, 182 Ariz. 505, 898 P.2d 454 (1995) 43, 53, 57
State v. Theus, 203 Ariz. 339, 54 P.3d 368 (App. 2002) 78

State v. Tison, 160 Ariz. 501, 774 P.2d 805 (1989) 50
State v. Towery, 186 Ariz. 168, 920 P.2d 290 (1996) 52
State v. Tucker, 215 Ariz. 298, 160 P.3d 197 (2007) 52, 67, 71, 87
State v. Valencia, 132 Ariz. 248, 645 P.2d 239 (1982) 1, 102
State v. Valenzuela, 194 Ariz. 404, 984 P.2d 12(1999) 44
State v. Velazquez, 216 Ariz. 300, 166 P.3d 91 (2007) 95
State v. Watson (Watson III), 129 Ariz. 60, 628 P.2d 942 (1981) 103
State v. West, 176 Ariz. 432, 862 P.2d 192 (1993) 9 ..... 111.
State v. Williams, 175 Ariz. 98, 854 P.2d 131 (193)..... 67
State v. Williams, 183 Ariz. 368, 904 P.2d 437 (1995) 95, 100
State v. Wood, 180 Ariz. 232, 881 P.2d 1158 (1994) 75
State ex rel. Thomas v. Grandville (Baldwin), 211 Ariz. 468, 123 P.3d 662 (2005) 81, 87, 88, 101
West v. State, 725 So.2d 872 (Miss. 1998) 77
STATUTES
ARS § 13-703(B) 52
ARS § 13-703(F)(5) 3
ARS § 13-703(F)(6) 3
ARS § 130703(G) 25
ARS § 13-703.01(H) 88
ARS § 13-703.01(K) 68, 78, 79, 89
ARS § 13-703.01(L) 89
*xii ARS § 13-703.01(P) 50, 68, 79
ARS §13-703.04 51
ARS §13-4031 1
ARS §13-4033 1
KSA § 21-4624(e) 64
RULES OF COURT
Rule 11, *Arizona Rules of Criminal Procedure* ..... passim
Rule 23.3, Arizona Rules of Criminal Procedure 39
MISCELLANEOUS AUTHORITES
Arizona Capital RAJI 1.0 48
Arizona Capital RAJI 2.4. 89

*i ISSUES PRESENTED

1. Was Appellant deprived of due process since he was incompetent when tried, found guilty and sentenced to death in this case?

2. Did the trial court deprive Appellant of an impartial jury at both of his trials and abuse its discretion by limiting the form, scope and length of voir dire?

3. Was Appellant denied his constitutional right to a fair and impartial jury at both of his trials as a result of the trial court's erroneous rulings during voir dire?

4. Did the trial court abuse its discretion and deny Appellant his right to a fair trial when it admitted irrelevant gruesome autopsy photographs during both trials?

5. Did the trial court commit structural error by refusing to instruct the jury on the lesser included offense of second degree murder?

6. Were the jury instructions that failed to adequately define the (F)(6) aggravator in violation of the Eighth and Fourteenth Amendments?

7. Was it fundamental error to fail to give a jury instruction that precluded the jury from finding Appellant vicariously liable for his codefendant's conduct as an aggravating circumstance?

8. Were the jury instructions that failed to completely and accurately define the *Enmund/Tison* predicate in violation of the Eighth and Fourteenth Amendments?

9. Was the *Enmund/Tison* predicate proven beyond a reasonable doubt

10. Were the (F)(5) and (F)(6) aggravating factors proven beyond a reasonable doubt at either trial?

11. Is ARS § 13-703(E) unconstitutional since it does not require that once a defendant proves mitigating circumstances exist that the State prove beyond a reasonable doubt that the mitigation is not sufficiently substantial to call for leniency?

*ii 12. Was Appellant's right not to be subject to double jeopardy, fundamental fairness and due process and Arizona law violated when the court permitted the State to retry the (F)(5) aggravator, the depraved prong of the (F)(6) aggravator and whether Appellant was the killer and if so whether he acted intentionally?

13. Did the trial court abuse its discretion and violate Appellant's rights under the Eighth Amendment when it precluded all evidence of future prison conditions, life imprisonment and lack of future dangerousness?

14. Whether the second penalty jury's death sentence is now void since it failed to find beyond a reasonable doubt the cruel and heinous prongs of the (F)(6) aggravator and the *Enmund/Tison predicate?*

15. Did the trial court violate Appellant's right not to be subject to double jeopardy when it instructed the jury that it could consider the cruel, heinous or depraved prongs of the (F)(6) aggravator as three aggravating circumstances?

16. Was the jury instruction that inadequately and inaccurately set forth the jury's mitigation assessment structural error since it lowered the State's burden of proof?

17. Was Appellant deprived of his right to due process as a result of the cumulative affect of the State's prosecutorial misconduct?

18. Should the Court reduce Appellant's death sentence upon independent review?

*1 JURISDICTION

This Court has jurisdiction over this appeal pursuant to Arizona Constitution, Article 6, § 5; ARS §§ 13-4031 and 13-4033.

STATEMENT OF THE CASE

This case comes before the Court following two separate jury trials that resulted in Appellant, Shawn Patrick Lynch, receiving a death sentence even though neither jury determined as a matter of fact that he (as opposed to his codefendant Michael Sehwani) actually killed the victim. The first trial ended in a mistrial after the jury refused to impose the death penalty because it had serious doubts as to whether Shawn was the person who slit the victim's throat and killed him during a botched residential burglary. After several days of deliberations the first jury sent out the following note that best sums up the evidence in this case:

[Since] Shawn Lynch may not have been the person that actually cut Mr. Panzarella's throat, some feel that if he didn't cut then he doesn't deserve death. (ROA-Item 352.) [1]

1 Hereafter all references to the Official Record on Appeal will be identified solely as "Item" with its corresponding number.

As this Court has often stated: "When there is a doubt whether the death sentence should be imposed, [the Court] will resolve that doubt in favor of a life sentence." *State v. Carlson*, 202 Ariz. 570, 588, ¶70, 48 P.3d 1180 (2002). *Accord*, *2 *State v. Valencia*, 132 Ariz. 248, 250, 645 P.2d 239, 241 (1982). This is just that type of case as there is considerable doubt whether Shawn Lynch killed, attempted to kill, intended that a killing would take place or acted with reckless indifference to human life, and therefore deserves to die for the conduct of his codefendant, who disproportionately received a life sentence. (RT 4/11/08.) *See, State v. Lacy*, 187 Ariz. 340, 929 P.2d 1288 (1996).

PROCEDURAL HISTORY

On April 6,2001 Shawn Lynch and his codefendant, Michael Sehwani, were indicted by the Maricopa County Grand Jury and charged with Count 1, First Degree Murder (alleged alternatively as both premeditated and felony murder); Count 2, Kidnapping; Count 3, Armed Robbery; and Count 4, Armed Burglary. All counts were alleged to be dangerous offenses. The Indictment alleged that the two codefendants committed the forgoing crimes on March 25, 2001 and in the course of or in furtherance of the offenses one of them killed James Panzarella. (Item 01.) The State filed its Notice of Intent to Seek the Death Penalty against both defendants on May 15, 2001 but alleged no specific aggravating circumstances. (Items 19 & 20.)

Following the Court's Opinion in Ring v. Arizona (Ring II), 536 U.S. 466 (2002) and the amendments to Arizona's death penalty statutes the State *3 filed its Notice that it would seek to prove as aggravating circumstances that the murder was committed with the expectation of pecuniary gain (ARS § 13-703(F)(5)) and was cruel, heinous or depraved (ARS §13-703(F)(6). (Item 62.) Appellant challenged the State's ability to seek the death penalty on numerous federal constitutional grounds, all of which were denied. (Items 28, 47, 63, 65, 69, 74, 77, 84, 240, 241, 260 & 262; RT 11/1/01, RT 8/22/02, RT 10/18/05 at 10.)

On September 6, 2002 the two defendants' cases were severed upon the agreement of all parties and the trial court. (RT 9/6/02 at 9-11.)

Appellant moved to dismiss the (F)(6) aggravator on the grounds that it was vague and overbroad and even in light of this Court's precedent is not sufficiently defined as to narrow its application consistent with the Eighth Amendment. (Item 143.) The State avowed that it would only seek to prove the especially cruel prong of the aggravator and would submit jury instructions that adequately narrowed the aggravator. (Item 150.) The trial court denied the motion. (RT 10/18/05 at 10, RT 12/6/05 at 8-12.)

Appellant moved the trial court for individual sequestered voir dire. (Item 113.) The trial judge admitted that "this is the first time for me [picking a capital case jury]" yet did not "see it as an. efficient use of time" and denied the motion. Instead the court conducted voir dire in groups of 10 *4 to 12 prospective jurors and limited counsel to one hour total voir dire per group. The court also forbade either party from providing any information pertaining to the alleged mitigators or aggravators or from posing any hypothetical questions pertaining to the same during voir dire. (Items 226 & 224; RT 1/5/04 at 2-5; RT 10/18/05 at 25-27, RT 10/25/05 at 6-8.)

Appellant was found to be incompetent to stand trial and after 5 months of treatment and services was deemed restored. The trial court . denied a second motion to determine competency prior to the first trial. (Items 164, 165, 199 & 200; RT 4/22/04, RT 3/8/05, RT 10/18/05 at 6-9.)

Appellant's jury trial commenced October 25, 2005. The court denied Appellant's motion for a directed, verdict on all counts. (RT 11/29/05 at 29-32.) The trial court refused to instruct the jury on the lesser included offense of second degree intentional murder and submitted both felony murder and premeditated murder to the jury. (Id. at 60-63.) On December 1, 2005 the jury found Shawn guilty of all 4 counts but unanimously of only felony murder. (Items 308-311.)

After a brief aggravation hearing the court denied Appellant's motion for a directed verdict and submitted both alleged aggravators and the *5 *Enmund/Tison*[2] determination to the jury for decision. (RT 12/6/05 at 55-57, 61-69.) The jury found unanimously that Shawn was a major participant in the underlying felonies and acted with reckless indifference to human life but failed to find that he killed or intended to kill the victim. (Item 318, RT 12/7/05 at 22-23.) The jury found that the State proved the murder was especially cruel and heinous but was unable to reach a verdict on the (F)(5) aggravator and whether the murder was especially depraved. (Item 319, RT 12/7/05 24-26.)

2 *Enmund v. Florida*, 458 U.S. 782 (1982); *Tison v. Arizona*, 481 U.S. 137 (1987).

The trial court granted several pretrial motions by the State that precluded Appellant from offering evidence of residual doubt, lack of future dangerousness, and future prison conditions and parole eligibility if given life instead of a death sentence during the penalty phase of the trial. (Items 224, 225, 254, 258 & 264; RT 10/18/05 at 10-14.) The trial court did, however, permit Appellant to argue in mitigation there was doubt as to whether he was the actual killer. (RT 12/7/05 at 8-12.)

After a 7 day penalty phase trial the jury indicated it was unable to reach a verdict and that many believed the death penalty was inappropriate since Shawn was not the person that cut the victim's throat. (RT 2/2/06.) The court instructed the jury further and over Appellant's objection had the *6 lawyers make additional arguments on this limited issue. The jury failed to resolve its impasse and the court declared a mistrial. (RT 2/6/06 at 38-41.)

Over Appellant's objections and pretrial motions to dismiss the trial court permitted the State to retry the death sentence, (F)(5) aggravator and especially depraved prong of the (F)(6) aggravator at the second trial. (Items 378, 381, 383, 393, RT 3/27/08 at 5-7.) Similarly, over Shawn's objections, the court permitted the State to again argue that he was the person that slit the victim's throat. The court also permitted the second jury to consider the first jury's determination that the murder was especially cruel and heinous rather than submit that factual finding and the *Enmund/Tison* issue to the second jury. (Items 392, 411, 457, RT 3/27/06 at 14-28, RT 4/11/06 at 27-41, RT 4/17/06 at 109-12.)

Appellant moved for a directed verdict on the (F)(5) and partial (F)(6) aggravators which was denied. (RT 5/3/06 at 54-58.) The second jury found the State proved the (F)(5) and especially depraved (F)(6) aggravator. (RT 5/8/06 at 3, Item 448.)

The court instructed the jury at the inception of the penalty phase (and the State argued) over Appellant's objection that the State had proven 4 (rather than 2) aggravating circumstances detailing each separate prong of the (F)(6) factor as a separate factor for consideration. (Item 378, 383, 393, *7 467. at 1-2, RT 5/9/08 at 30.) The same error was repeated at the close of the penalty phase. (RT 5/17/06 at 25, RT 5/18/06 at 4-5.11-12.) The jury returned a verdict of death. (Item 472.)

The trial court immediately imposed the jury's death sentence and consecutive thereto maximum concurrent prison terms of 21 years each on Counts 2, 3 and 4. (Item 477, RT 5/23/06.) Appellant moved for a new aggravation and penalty trial on several grounds that were denied. (Items 457, 465, 480, 482 & 483.) Appellant timely filed his Notice of Appeal. (Item 478.)

FACTS

On March 25, 2001 at about 4:30 pm Arthur Panzarella found his younger brother James tied to a chair with speaker wire in the guest house of his parent's North Scottsdale home with his throat slit. (RT 11/8/05 at 25-41.)[3] The police arrived at 4:40 pm and commenced processing the scene. They found the home in disarray with drawers opened and obvious items such as stereo equipment and the contents of the victim's wallet missing. (Id. at 42-47, 64-66, 104; RT 11/15/05 at 5-26.)

3 As this case was tried twice and much (but not all) of the evidence was presented at both trials the primary references here are to the first trial in 2005 that resulted in Appellant's convictions.

*8 While processing the scene the police found a receipt from a Scottsdale Bar known as Ernie's dated March 24, 2001 at 12:41 am. The receipt was outside the home on the ground with an apparent blood stain. (RT 11/15/05 at 25-26, exhibit 282.) The two bartenders from Earnie's recalled seeing Panzarella in the bar that night. He was somewhat of a regular. He first came in between 8:00 and 8:30 pm and later returned after midnight with two "shady" looking guys who looked out of place. The second time Panzarella appeared calm and his usual self and borrowed $60 from one of the bartenders, which was not out of the ordinary. (RT 11/28/05 at 75-87.)

The police investigation led them to a young woman named Terra potts who at the time worked for an escort service known as DeWa Agency. The company provided private services including nude and semi-nude dances for a fee. Ms. Potts explained that on March 25, 2001 at about 5:15 am she had got called out to a home in the area of 74th Street and Cholla Road in Scottsdale. She and her driver/body guard named Tracy Ramsey arrived at the Panzarella home around 6:00 am. There they were met in front of the main home by a "weasley guy" later identified as Michael Sehwani, who led them back to the guest house. (RT 11/9/05 at 3-18.)

*9 Inside the guest home they met two other men sitting around a glass table. Potts described one as being "nice" and the other as also being "weasley." Ramsey negotiated for her fee with the men at the table while Potts spoke with Sehwani. (Id. at 17-19.) She and Sehwani went into the bedroom and negotiated further for her "tip" of an additional $100 on top of the $200 paid by Panzarella for her services. Sehwani wrote Potts a check from Panzarella's check book he obtained from a desk in the bedroom. (Id. at 19-28, exhibits 168 and 169.)[4]

4 References herein to trial exhibits are to the numbers used at the second trial as identified on the Exhibit Worksheet filed with this Court (Item 473A) unless otherwise indicated.

Potts came out of the bathroom and found Sehwani naked in the bed, smoking either crack cocaine or methamphetamine, and masturbating. She danced naked for nearly an hour until Sehwani climaxed and then dressed and left the house with Ramsey. (Id. at 25-31, 40-41.)

Potts later identified Sehwani as the man she danced for but failed to identify Lynch before or during trial. (Id. at 29-31, exhibit 174.) Sehwani was the only client identified on the DeWa sales log and contract which indicated "Mike Sehwani" called in for a dance at 5:15 am. (Id. at 69-85, exhibit 179 & 180.)

*10 Ramsey could not "positively identify anybody" at trial as being at the home that morning. He described one of the men as being "scruffy" with "greasy hair" sitting at the table "laid back" and not saying much of anything. The other man at the table paid him with a credit card. Ramsey described this man as being "relaxed" and "just sitting there" like he had been drinking.(RT 11/14/05 at 25-30, 33-34.) The three men sat at the table while Potts and Sehwani went into the bedroom. The man Ramsey had prior to trial identified as Lynch (id. at 5-10) retrieved a couple of beers from the refrigerator which he and the other gentleman drank. (Id. at 37-41.) A kitchen knife sat on the table but Ramsey, as a trained body guard, found nothing suspicious about the knife. (Id. at 57-58.)

The police investigation led to a paper trail of receipts and eyewitness identifications of Sehwani using the victim's credit and debit cards over the next day or so to buy himself food, lodging and clothing. The investigation revealed that at 7:15 am that morning Lynch and Sehwani went into an ABCO Market in Scottsdale. Lynch asked the man about some lottery tickets while Sehwani paid for some items with the victim's credit card after the clerk showed him how to use the pin pad. (RT 11/10/05 at 29-37, exhibits 207 & 209.)

*11 Later that morning Sehwani made a purchase at a Circle K store on 100th Street and Frank Lloyd Wright Boulevard in Scottsdale with the victim's American Express Card. (RT 11/7/05 at 72-73.) The next day Sehwani purchased $5.00 worth of gas with the victim's card at a Circle K. (RT 11/16/05 at 44-57.)

Later on March 25, 2001 at a Mervyn's Store on Cactus and Tatum Road Sehwani, now alone, bought some items with the victim's credit card. (RT 11/22/05 at 76-83, exhibits 167, 211 & 212.) Also that day Sehwani entered Dino's Restaurant in Scottsdale alone and ordered French fries for take out. Sehwani went outside for a minute, came back in and added a hamburger and coleslaw to his order. He paid, again, with the victim's debitcard. (RT 11/22/05 at 4-13, 83-88, 90-96.)

On March 26, 2001 Sehwani got himself a haircut, again paying with the victim's credit card at a salon known as Genuine Cuts. At this time he was wearing a pair of work boots. (RT 11/28/05 at 36-42, exhibit 224.) This is significant since a similar shoe print was found in the victim's home on a book shelf. (Id. at 27-28.) By the time Sehwani was arrested his work boots had been discarded, as had most of the clothing he wore the morning of the murder. In the interim Sehwani had gone to a K Mart and outfitted himself *12 with new clothes and Everlast shoes, again paying with the victim's credit card. (RT 11/17/05 at 10-17, RT 11/22/05 at 55-66, exhibit 223.)

Later on March 26, 2001 Sehwani went alone into a Boston Market and bought a family chicken dinner. After unsuccessfully trying the victim's American Express card he paid with the victim's Visa card. (RT 11/22/05 at 68-75.)

A fraud investigator from Bank One testified that there were three transactions made on March 25, 2001 on Panzarella's debit card which included one at a Circle K, the purchase at Dino's Restaurant and a final one $300 withdrawal was made on the card on March 26, 2001 at 5:20 am and a second unapproved attempted withdrawal occurred moments later. (Id. at 14-15.) Attempts were also made to use the victim's credit cards on March 26, 2001 at Genuine Cuts, K Mart and Boston Market. (Id. at 15-17.)

A fraud investigator from American Express testified that the victim's card was unsuccessfully used at ABCO Market, three times at a Circle K on March 25, 2001 and at the Boston Market and Mervyn's on March 26, 2001. (RT 11/16/05 at 32-43, 58-66.)

Further investigation revealed that on March 25, 2001 Lynch and Sehwani checked into a Best Western Motel. Lynch registered with his *13 Florida driver's license and paid cash. Later that evening after 10 porno movies had been rented to the room upon request Sehwani came down and secured the charges with the victim's credit card. (RT 11/16/05 at 5-9, RT 11/28/05 at 50-51, 56-68.)

On March 26, 2001 the two men checked into a Motel 6. (RT 11/28/05 at 91-97.) Police apprehended both defendants entering a pick up truck in the parking lot at 4:00 pm that day. Sehwani was entering the driver's side and Lynch the passenger side when contacted. Inside the truck they found Sehwani's wallet which contained the victim's credit cards. A glass smoking pipe was removed from Lynch's pant's pocket. (RT 11/10/05 at 44-55, 63-68, 92-95, 98-99, exhibits 237-244.)

Both defendants' clothes were confiscated when taken into custody. Lynch's black Converse All Stars were not immediately impounded but were sent with him to the Scottsdale jail where they were later taken and after exchanging hands 6 times wound up being impounded by the lead investigator, Detective John Kirkham. (RT 11/10/05 at 115-25.) Sehwani was wearing his new outfit that he had bought at the K Mart including a brand new pair of Everlast shoes, which obviously had no blood stains on them. (Id. at 70-72.) Upon arrest Sehwani had stitches in the back of his head and "fresh" cuts on his hand, finger and thumb. (Id. at 66-67.)

*14 A search of the defendants' motel room revealed the remaining clothing bought by Sehwani at the K Mart, a 45 caliber handgun belonging to the victim under the north bed's mattress with the clip to the gun under the south bed's mattress along with a glass smoking pipe commonly used for methamphetamine and crack cocaine. (RT 11/17/05 at 4-7, 10-14, 20, exhibits 324, 326, 330.)

After processing the scene the police transported the victim (still bound to the chair) to the medical examiner's office for an autopsy. Attempts at developing latent prints from the body were unsuccessful. (RT 11/9/05 at 99-104, 121-22.) Police impounded numerous items from the home for testing including a knife, with apparent blood staining on the handle and blade, found in the bedroom that Sehwani used for his nude escort dance. (RT 11/14/05 at 76-90, RT 11/15/05 at 5-28, 53, exhibit 236.) Detective Kirkham initially opined that there was blood drops on the floor and blood staining in the sink of the adjoining bathroom. (RT 5/11/06 at 29-33.)

Phillip Keen, the medical examiner, with the assistance of the lead detective removed the wires bounding the victim to the chair and performed . an autopsy on the body. Keen noted an "incised" wound on the victim's right index finger and a "fresh" bruise on his left shoulder blade and left *15 chest wall. He believed the wounds were "possibly" from the chair and made "minutes" before death. (RT 11/17/05 at 83-87.) The ligature from being bound was not in his opinion very tight and "didn't impeded circulation." (Id. at 97.)

Keen opined that the wound to the victim's neck was the result of a single knife wound that most likely resulted from two tugs of the knife inflicted from left to right. (Id. at 98, RT 11/21/05 at 26-29, 39.) The wound severed the jugular vein and ceratoid artery on the right side and "quickly" led to death. Keen estimated that death occurred no more than 2 to 3 minutes after the infliction of the wound. The victim would have been conscious at most for "a minute or so" following being cut. (Id. at 27-30.) Keen could not with precision tell where the assailant was standing, but based upon the nature of the wound believed the killer was behind the victim and to the right. (Id. at 39-40.) Not surprisingly, the victim's blood contained a small amount of alcohol, and metabolites of methamphetamine, amphetamine and cocaine which evidenced recent use (within an hour or two of death). (Id. at 37-38.)

DNA analysis revealed the victim's blood on the left and right Converse All Stars supposedly worn by Lynch. Analysis of the inside of the shoes revealed a mixed sample indicating that Sehwani "possibly" could *16 have been a minor contributor with Lynch being a major contributor of the DNA. (RT 11/21/05 at 67-77, 80-84.) Although the DNA analyst contaminated part of the shirt traced to Sehwani, the uncontaminated portions of the shirt revealed numerous blood stains matching Sehwani's DNA. (Id. at 95-103.) Similarly, blood processed from the handle of the knife (exhibit 236) recovered from the victim's bedroom matched Sehwani's DNA. Processing of the blade of the knife was negative for blood and not further tested for DNA. (Id. at 84-89.)

Dennis Olson, a purported blood spatter expert, opined that the person who cut the victim's throat was "anywhere behind" the chair within a foot of the victim. Olson noted a "void" in the pool of blood on the floor surrounding the victim which he hypothesized was where the perpetrator was standing at the time of the fatal act. Olson's theory was that the after the neck was cut the blood flowed down the victim and began to pool on the ground. He opined that the blood pattern on the Converse All Stars indicated that they were behind the victim at the time receiving droplets from the victim's blood hitting the pool on the ground. (RT 11/22/05 at 24-34.) Olson, obviously, could not tell from his analysis whether the shoes were moving when the blood hit them or the exact position of the person who cut the victim's throat. (Id. at 47-48.)

*17 Detective Kirkham, also versed and trained in blood spatter analysis, disagreed and opined that the blood spots on the All Stars were caused by an arterial spurt rather than secondary to pooled blood. (RT 5/11/06 at 29-33.)

Duane Hilderbrand, a purported footwear impression expert, opined that it was "highly probable" that impressions developed from the victim's bathroom matched the All Stars' tread pattern. He excluded the All Stars' and Everlast shoes worn by Sehwani upon arrest from the work boot type print found in the living room on the bookshelf. (RT 11/28/05 at 15, 21-22, 27-28.) Police lifted 29 useable latent fingerprints from the victim's home. None matched Lynch. (Id. at 36-37, RT 11/14/05 at 90-91.)

ARGUMENT

1. Appellant's convictions and sentences are void and violate his right to due process since he was incompetent. The trial court abused its discretion by failing to hold a competency hearing and order an evaluation after his counsel alerted the court that his client had decompensated and was now delusional and no longer competent.

STANDARD OF REVIEW: A trial court's finding of competency is reviewed for an abuse of discretion. *State v. Glassel*, 211 Ariz. 33, 44, ¶27, 116 P.3d 1193 (2005). The issue on review is whether reasonable evidence supports the trial court's finding that the defendant was competent, considering the facts in the light most favorable to sustaining the finding. *Id.* An abuse of discretion occurs "where the reasons given by the court for its *18 action are clearly untenable, legally incorrect, or amount to a denial of justice." *State v. Chapple*, 135 Ariz. 281, 297, n. 18, 660 P.2d 1208 (1983).

Due process mandates that a State "observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent." *Drope v. Missouri*, 420 U.S. 162, 172 (1975). A defendan's conviction obtained while he or she is mentally incompetent is invalid in violation of due process and must be vacated on appeal. *See, Pate v. Robinson*, 383 U.S. 375 (1966); *State v. Bishop*, 162 Ariz. 103, 781 P.2d 581 (1989).

A criminal defendant is presumed to be competent and the burden is upon him or her to prove by a preponderance of the evidence otherwise. *Cooper v. Oklahoma*, 517 U.S. 348,368-69 (1996); State v. Cameron, 146 Ariz. 210, 214,704 P.2d 1355 (App. 1985). The appropriate inquiry is whether the defendant "has the present ability to consult with his lawyer with a reasonable degree of rational understanding, and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 403 (1960). Examinations into competency focus "on an extremely narrow issue: whether whatever is afflicting the defendant has so affected his present capacity that he is unable to appreciate the nature of the proceedings or to assist his counsel in conducting his defense." *19 *State v. Steelman*, 120 Ariz. 301, 315, 585 P.2d 1213, 1227 (1978). *See also, State v. Moody*, 208 Ariz. 424, 443,¶ 50, 94 P.3d 1119 (2004) (reiterating that competency inquiry is "two-pronged.")

Defense counsel midway in the pretrial proceedings filed a Motion for a Competency Evaluation pursuant to Rule 11, *Arizona Rules of Criminal Procedure*. Defense counsel made clear that due to their perceptions Shawn was clearly "decompensating" and in his condition was not able to assist counsel in his own defense. Counsel advised the court that Shawn was refusing all legal visits, and when he had participated in visits his responses were aberrant and exhibited extreme paranoia. (Item 145; RT 1/5/04 at 6-16.) The court ordered a prescreen evaluation. (Item 146.)

The initial Pre-Evaluation indicated that Shawn was not taking any medication and further evaluation was warranted to rule out Paranoid Personality Disorder versus Psychotic Disorder NOS. The evaluator did not opine whether he had the capacity to assist his counsel. (Item 151.) The trial judge questioned the prescreen evaluator, Dr. Gwen Leavitt, who recommended a full Rule 11 exam to determine if Shawn was exhibiting "normal paranoia or [was] psychotic." The court ordered a full Rule 11 exam. (RT 1/8/04 at 27-28, 39; Item 152.)

Both examiners opined that Shawn was incompetent but restorable. In both reports it is indicated that Appellant had a 20 year crack cocaine *20 addiction, borderline intelligence with an IQ around 80, long standing post traumatic stress disorder, and paranoid personality disorder with delusions. Both doctors indicated that he was not capable of assisting his counsel. (Item 164.) The court found him incompetent and ordered restoration services. (RT 4/22/04.)

After 3 months of restoration services Shawn remained incompetent. Dr. Bruce Kushner opined: "Mr. Lynch should be considered incompetent to stand trial at this point. His ability to assist in his defense is the outstanding issue at this point." (Item 173.)

After 2 more months of services Kushner opined that Shawn was now competent and "can cooperate with counsel, should he choose to do so." (Item 203 at 1.) Ironically, Dr. Kushner also "noted that Mr. Lynch is likely delusional and idiosyncratic in his thought processes." (Id.) The doctor paradoxically centering around a belief in aliens and beliefs that the radio and TV have messages from him, along with concerns about the welfare of his girlfriend" on the one hand, yet somehow despite his

paranoia had the capacity to assist his counsel. He discounted Shawn's delusions and his own diagnosis that Shawn suffered from Delusional Disorder, Persecutory Type by rationalizing that "despite such ideations, which on the surface appear *21 paranoid-like and might seemingly preclude Mr. Lynch's ability to cooperate, he has in fact formed a relationship with RTC staff." The doctor apparently equated Shawn's ability to speak with treatment staff with the capacity to trust and assist his appointed counsel. (Item 203 at 7-8.)

Defense counsel requested an independent evaluation and evidentiary hearing. (RT 9/28/04.) The parties however later stipulated to let the court determine competency on Kushner's report and vacated the evidentiary hearing. The court, of course, found Shawn restored to competency. (Items 199 & 200, RT 3/8/05.)

For a brief period of time the trial court granted Appellant's request to dismiss his appointed counsel and proceed pro se despite counsel advising the court that he had concerns since "Mr. Lynch has refused discuss anything since March [2004]" and was now on several psychotropic medications. (RT 4/8/05 at 3-6,18-22.) Counsel was reappointed within two months. (RT 5/27/05.) Several months later counsel moved the court for a second Rule 11 evaluation and avowed that they believed "he cannot assist counsel in his own defense." Counsel advised the court that their client was now "delusional [and] not malingering." (RT 10/18/05 at 6-7.) The trial court denied any further evaluation because the motion was based only upon *22 "defense counsel's subjective assessment of the defendant's condition." (*Id.* at 9.)

In a recent capital habeas corpus proceeding originating from Arizona the Ninth Circuit reiterated that when "the evidences raises a *'bona fide* doubt' about the defendant's competence to stand trial, a trial judge must sua sponte conduct an evidentiary hearing." *McMurtrey v. Ryan*, 539 F.3d 1112, 1118 (9th Cir. 2008) (quoting *Pate v. Robinson*, 383 U.S. 375, 385 (1966). In *McMurtrey* the Court affirmed the District Court's granting of a writ of habeas corpus based upon the trial court's failure to hold a competency hearing prior to trial when alerted by defense counsel that the defendant might be incompetent.

Of note, here, the *McMurtrey* Court recognized that a Rule 11 report finding a defendant competent is not dispositive on this issue when other evidence from the record indicates a reasonable doubt exists as to the defendant's competency. *Id.* at 1125. Although, like here, some of the Rule 11 doctors had opined that McMurtrey was competent, the Court disagreed based upon the medical record evidence that indicated the defendant was suffering the effects of his mental illness and unable to assist his counsel or understand fully the proceedings. The Court found unpersuasive the Rule 11 doctor's prior conclusion that the defendant was competent and failed to *23 condone the trial court's reliance on the prior report and refusal to hold a competency hearing once alerted by counsel. *Id.* at 1125-27 ("[A doctor's] previous conclusion that [the defendant] was competent to stand trial does not obviate the need for a hearing.") quoting *Torres v. Prunty*, 223 F.3d 1103,110 (9th Cir. 2000)).

In the instant matter the trial court similarly abused its discretion and violated Lynch's right to due process. Dr. Kushner's inconsistent conclusions raised red flags regarding Shawn's current capacity to assist his counsel. This is especially true in light of his diagnosis that Shawn suffered from a mental illness and remained delusional notwithstanding his medication regime. Moreover, this diagnosis and opinion were consistent with that of two other medical professionals whose reports were before the court. Shawn's incompetence became a more alarming issue when defense counsel raised the issue again seven months after his client had been returned to general population at the jail where he had "decompensated" and was now "delusional and not malingering." The trial court abused its discretion by refusing to accept counsel's avowals and not ordering a second evaluation and competency hearing.

"Due process requires a state court to hold a hearing where substantial evidence before the court indicate[s] the need for further inquiry into the *24 defendant's competency." *McMurtrey*, 539 F.3d at 1118 (quoting Drope, 420 U.S. at 180.) Since Shawn's condition deteriorated after being deemed restored and he was at all times according to all experts delusional and paranoid there is a reasonable doubt as to his competence during trial since he lacked the capacity to trust and assist his counsel. Consistent with due process, Shawn's convictions and sentences must now be vacated.

2. The trial court abused its discretion by limiting the form, scope, and length of voir dire at both trials. Appellant was deprived of his right to an impartial jury under the Sixth Amendment.

STANDARD OF REVIEW: The trial court's use of questions addressing the death penalty is subject to de novo review. *State v. Kayer*, 194 Ariz. 423, 431, 984 P.2d 31 (1999). This court reviews the scope of voir dire for an abuse of discretion. *State v. Johnson*, 212 Ariz. 425, ¶29, 133 P.2d 735 (2006).

While "'the State has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes,' [ ] that does not and cannot mean that jurors must be willing to impose a death sentence in every situation in which a defendant is eligible for that sanction." *Uttecht v. Brown*, U.S., 127 S.Ct 2218 (2007) (Stevens, J. dissenting). "[P]art of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors." *Morgan v.* *25 *Illinois*, 504 U.S. 719, 729-30 (1992). The Supreme Court has therefore mandated that questions be posed to potential jurors that probe into whether their views on the death penalty will "prevent or substantially impair the performance of [their] duties as jurors." *Wainwright v. Witt*, 469 U.S. 412, 433 (1985).

Early on during pretrial proceedings Appellant filed a Motion to permit individualized sequestered voir dire and also a proposed jury questionnaire. (Items 113 & 114.) The trial court ruled at the initial trial management conference that it would limit voir dire to one hour per side and prohibit counsel from posing hypothetical scenarios or providing any specific information pertaining to the case during voir dire. (RT 11/5/03 at 2-5.)[5] At a later trial management conference shortly before the first jury trial when questioned regarding Appellant's request for individual voir dire the court indicated: "I don't see it as an effective use of time." (RT 10/18/05 at 25-27.) A week later the court denied Appellant's request and indicated that *26 instead they would conduct voir dire in groups of 10 to 12 prospective jurors. (RT 10/25/05 at 6-8.)

5 Over Appellant's objections the court also granted the State's Motion to Preclude Voir Dire on Specific Mitigation. (Items 226, 247 & 264, RT 10/18/05 at 12.) As this issue has been firmly decided against Appellant previously by this Court, *State v. Johnson*, 212 Ariz. 425, 440, ¶¶ 29-35,133 P.3d 735, 750 (2006), this issue is also summarily presented *infra*. to avoid federal preclusion. However, the difference in this case from *Johnson* is that the court was even broader and precluded all questioning regarding Appellant's background, character and propensities or the circumstances of the case. *See*, ARS § 13-703(G).

A. The trial court's limitations on voir dire and refusal to permit individual voir dire deprived Appellant of an impartial jury during his first trial.

At the inception of each group voir dire the trial court generally described the three potential trial phases and indicated that basically the second phase involved determining whether the aggravating circumstances alleged by the State "are true." The court continued: "Simply put, this phase determines whether the guilty verdict in phase one is appropriate for the death penalty." (E.g., RT 11/1/05 at 18-22. See also, 11/2/05 at 35-39.) The court gave no details regarding what an aggravating or mitigating circumstance might entail or how a juror would factor such information into the penalty decision. Such a dearth of information prompted comments from jurors such as: "I'm not sure if I understand it real well." (RT 11/2/05 at 40.)

Such nebulous concepts of aggravation and mitigation permitted the State and trial court to improperly rehabilitate and pack the jury with pro death jurors. For example, juror 75 wrote on his questionnaire that he was pro death and believed in an "eye for an eye." After the trial court asked him "can you be fair? "and he responded "yes" he remained on the panel even though he had no clue what the mitigation or aggravation was that he was *27 asked to "fairly consider." (RT 11/1/05 at 91-92.) A similar question and answer occurred with juror 57 who indicated he would always vote for death but was rehabilitated by being asked whether he would "listen" to the "mitigation" evidence with no further information. (Id. at 65-70.)

It also became obvious during group voir dire that once a juror was released because they indicated they were generally against the death penalty and could not impose the death penalty, that the remaining jurors on the panel were infected by the questioning

and sought removal on the same basis. For example, jurors 109, 119, 124, 125, 127, 136, and 141 all provided the same answer during group questioning and all but two were released by the court. (RT 11/2/05 at 42-48.) Unlike *State v. Bible*, 175 Ariz. 549, 570, 858 P.2d 1152 (1993) where this Court rejected a similar issue, in this case the foregoing contamination of the group of jurors deprived Appellant of the ability to rehabilitate these life scrupled jurors and have a truly impartial jury determine his guilt and fate.

B. The trial court's limitations on voir dire deprived Appellant of an impartial jury during his second trial.

Prior to the second trial the court affirmed its prior orders regarding jury selection. (RT 3/26/06 at 3-5.) The court also denied Appellant's request to advise the jurors in voir dire that he had been convicted of felony murder (as opposed to premeditated murder). (RT 4/3/06 at 73-76.) Such *28 fundamental information was essential for selection of the second jury as the court instructed each panel that the prior jury had already determined that Appellant "committed the crime of first degree murder [and] [c]ertain aggravating factors [6] have also been determined." (E.g., Id. at 19, RT 4/4/06 at 31, RT 4/5/06 at 15.) The court's refusal to permit the true nature of Appellant's conviction from being explored during voir dire prevented Appellant from discovering, questioning, and removing if necessary those jurors that held views that a death sentence is always appropriate when a person commits premeditated intentional murder. This limitation therefore violated Appellant's rights under the Sixth Amendment. *See, Morgan v. Illinois*, 504 U.S. 719, 729-30 (1992).

6 By emphasizing that the prior jury had found "aggravating factors" the court compounded from the inception of jury selection the misconception that the determination that cruelty and heinousness had been proven equated to two (rather than one) aggravators for this jury's consideration. This impermissible double counting had the further effect here of impaneling a panel of jurors with preconceived ideas of just how bad the case for death was against this defendant. See also, Issue 15 infra.

The imposed limits on voir dire also had the effect of packing the jury in the second trial with death prone jurors. For even though the court prohibited the parties from delving into the nature of Appellant's conviction and that he had not been found to be the actual killer it permitted the State to question and remove certain jurors by telling them what the case did *not* *29 involve. For example, juror 25 indicated that due to her religious beliefs she was generally opposed to the death penalty. On voir dire she reiterated her beliefs but indicated that in certain circumstances such as cases involving children she could see going against her beliefs. The court then advised the juror that "this case does not involve any children." Thereafter the prosecutor was permitted to exclude the juror (over Appellant's objections) because she could only impose death if the case involved children. This was the court's ruling even though the juror indicated in questioning by defense counsel that she could impose the death penalty if the crime was "heinous." (RT 4/3/06 at 118-20, 134-35, 143-45.)

If this Court upholds the trial court's severe limitations on the defense voir dire than it surely cannot, consistent with fundamental fairness and the Sixth Amendment, permit the conditioning as occurred with juror 25 and other jurors which lead to a death biased jury in violation of Appellant's rights. [7] *Cf., Johnson*, 212 Ariz. at 440, ¶¶ 29-35. In essence, by telling the jurors that the case did not involve children the court was advising jurors what was not aggravating about the case and thereby imposing a double standard permitting the State to stack the jury against Appellant. Such *30 uneven justice violates both the Sixth Amendment and due process. *See, Witherspoon v. Illinois*, 391 U.S. 510, 522, fn 20 (1968).

7 Appellant also asserts that he is entitled to relief from his sentences because the trial court's decision striking juror 25 was structural error in violation of *Witherspoon* and *Witt*. See, Issue 3 *infra*.

3. The trial court's rulings during voir dire violated Appellant's rights under the Sixth and Fourteenth Amendments during both jury trials.

Standard of Review: A trial court's decision on whether to strike a juror for cause is reviewed for an abuse of discretion. *State v. Ellison*, 213 Ariz. 116, 137, ¶88, 140 P.3d 899, 920 (2006). "Error in jury selection on Witherspoon and similar issues is

considered structural." "Harmless error analysis is inapplicable to the erroneous grant of challenges for cause on *Witherspoon*-type issues." *State v. Anderson* (Anderson I), 197 Ariz. 314, 322, 4 P.3d 369, 377 (2000.)

When a prospective juror indicates that he or she may be unable to act in an impartial manner because of personal feelings about the death penalty, a searching inquiry into the juror's reasoning must be made before the juror's initial statements on the issue can be accepted. *Wainwright v. Witt*, 469 U.S. 412, 425 (1985). Potential jurors may not be removed "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Id.* at 522. A pro life prospective juror may be stricken for cause only when they "state *unequivocally* that they could never impose the death penalty regardless of *31 the facts of the particular case." *Anderson* I, 197 Ariz. at 318, ¶7 (citing *Witherspoon v. Illinois*, 391 U.S. 510 (1968)). *See also, State v. Kayer*, 194 Ariz. 423, 432, 984 P.2d 31 (1999).

Adequate voir dire is essential to insure both an impartial jury and to permit counsel to intelligently exercise a defendant's peremptory or strikes for cause. *Morgan*, 504 U.S. at 731. Accordingly, when a prospective juror indicates that he may be unable to act in an impartial manner because of personal feelings about the death penalty, a searching inquiry into the juror's reasoning must be made before the juror's initial statements on the issue can be accepted. *Witt*, 469 U.S. at 425. *See also, Darden v. Wainwright*, 477 U.S. 168, 178 (1986) (juror's answer to *Witherspoon* question does not alone resolve the question of partiality.)

A. The trial court erroneously struck juror 119 from Appellant's first trial jury.

During group voir dire Juror 119 indicated that she was "not opposed to the death penalty" but also stated "I don't know if I could sentence someone to death." (RT 11/2/05 at 43-44.) Upon further questioning by the State she continued to maintain that although a difficult decision she "could [ ] follow the judge's instructions, and follow the law - - weigh the evidence." (Id. at 81.) When pressed further regarding whether she could actually vote for death she stated: "I don't know - - I couldn't say for certain *32 that I could." (Id. at 82.) Upon further questioning from defense counsel, however, she unequivocally stated that "if I would hear that it were a particularly brutal or heinous murder, yes. I might be able to vote for the death penalty in that case." (Id. at 98.) Seconds later she reiterated: "I believe if - - as I said earlier, the evidence - - the crime was so brutal, or horrible, yes, I believe that I would be able to" impose death. (Id. at 99-100.)

Contrary to this clear record and particular relation to this case where the prior jury had already found the murder to be especially "heinous," the trial court granted the State's motion to strike 119. After indicating that the record was "unclear" since counsel talked long enough to "get that juror to say something to satisfy your [position]" the court ironically recognized that the simple fact that the juror "expressed difficulty [in imposing death] is *not* a reason for them to be excluded" and yet somehow struck juror 119. (*Id.* at 109-112.) The trial court's ruling was clear error since the juror avowed that under certain circumstances she could impose death. This erroneous strike of a pro life juror was structural error.

B. The trial court erroneously struck jurors 25 and 49 from Appellant's second trial jury.

As discussed above in Issue 2, juror 25 clearly indicated during voirdire that although difficult she could in fact impose the death penalty in cases other than those involving children. As with juror 119 in the first trial, *33 juror 25 indicated in her questionnaire that "a real heinous crime in [her] belief would be a reason why [she] could give the death penalty." (RT 4/3/06 at 134.)[8] She confirmed during brief oral voir dire by defense counsel that it remained her belief that if the "crime was really *heinous*" she could "give the death penalty notwithstanding [her] religious beliefs." (*Id.* at 135.) The trial court struck juror 25 notwithstanding this two question exchange. The court indicated that it was striking her not because its view that defense counsel's questions had "worn [her] down" but because her responses to the court's question indicated that her beliefs that the Catholic Church is opposed to the death penalty was "incorrect" and "she would have to go against her faith to impose the death penalty." This is clearly an incorrect application of the law that more precisely permits striking a juror like this one only if her views on the death penalty would "substantially impair the performance of [her] duties as a juror." *Adams v. Texas*, 448 U.S. 38, 45. (1980). Defense counsel brought this to the court's attention by filing a motion to reinstate juror 25. (Item 402.)

The court reaffirmed its ruling based "the record that's already been established." Since the record indicated *34 she could rationally impose the death penalty (despite her religious convictions) where warranted the court committed structural error by striking juror 25.

8 Juror 25 also indicated in her questionnaire that she could vote to impose death in the proper case and that her decision would depend upon the facts and circumstances of the case. She also agreed that the death penalty was a proper function of the criminal justice system and that she would be able to enter a verdict that would cause the defendant to die. (See Item 402 and Questionnaire attached thereto.)

Juror 49 similarly indicated that she had some opinions against the death penalty and could not "honestly" say whether she could impose the death penalty. She stated further: "I think I would have difficulty if the death penalty was on the table." (RT 4/4/06 at 24-25.) The court asked no further questions and later excused the juror for cause upon the State's motion on its mistaken belief that "she would not be able to follow the law." (Id. at 67.) This excusal was not only a violation of *Witherspoon* and progeny but also violated this Court's holding in *Anderson I* that to excuse such jurors "without further questioning for clarification, [ ] violate[s]the Sixth Amendment and due process." 197 Ariz. at 319, ¶ 10. As with juror 25 above, striking juror 49 was structural error.

4. The trial court abused its discretion and denied Appellant a fair trial when it admitted irrelevant gruesome photographs during both trials.

STANDARD OF REVIEW: A trial court's ruling on the admission of photographs is reviewed for an abuse of discretion. *State v. Hampton*, 213 Ariz. 167, 173, ¶17, 140 P. 950, 956 (2006.)

*35 On the first day of the State's case in chief during the first trial Appellant objected to the admission of numerous photographs based upon their graphic and gruesome nature and tendency to inflame the jury. The State avowed that the photographs were relevant to its blood spatter expert's opinion that Appellant was the killer. Appellant avowed that during his pretrial interview the expert conceded he could not determine from all of the evidence (including the photographs) that this defendant was the killer. The trial court overruled in part Appellant's objections and admitted exhibits 35, 39, 40, 43 and 50. For some unknown reason the court sustained objection to exhibit 51 but later admitted that exhibit into evidence. (RT 11/8/05 at 70-76.)

The blood spatter expert referred to exhibits 50 and 51 which he opined indicated that the blood on a counter top came from an arterial spurt. (RT 11/22/05 at 20.) He also reference exhibit 52 which he opined to be a blood smear under the victim's foot. (Id. at 24-25.) The expert agreed that he could not determine from the evidence that Appellant was the killer. (*Id.* at 47-48.)

Later on during the guilt phase of the trial the State moved to admit exhibits 77 and 80-83 which are autopsy photographs of the victim with close up views of his wound and internal vessels and organs. After extended *36 argument the court sustained the objection finding the photographs irrelevant. (RT 11/17/05 at 44-58.) Thereafter the ME testified regarding his opinions as to the cause of death and related anatomical issues as well as the victim's state of consciousness after infliction of the knife wound. (Id. at 80-103.) The next morning the court permitted the State to voir dire the ME regarding exhibits 80 to 83 and reaffirmed its ruling that the photographs were not relevant to the cause of death issue. (RT 11/21/05 at 26-41.)

During the aggravation phase of the trial the State recalled the ME and again moved to admit exhibits 82-84 as illustrating what the ME was describing in terms of the victim's injuries. The court admitted the exhibits over objection finding them relevant to the (F)(6) aggravator. The court did not at that point weigh the prejudice from these photos against the asserted relevance. (RT 12/6/05 at 16-22.) Thereafter the ME testified as he did during the guilt phase regarding injuries suffered by the victim, whether the victim could "feel" his wind pipe being cut level of consciousness prior to his death. The ME did not refer to the photographs more than in passing and eventually the court instructed the prosecutor to remove exhibit 84 (a close up of the ME probing the victim's internal neck vessels) because "it's having an impact on the family too." (Id. at 39-46.)

*37 The trial court again admitted over objection exhibits 39, 40, 43, 50, 51, 83 and 84 during the aggravation phase of the second trial. (RT 4/12/06 at 105-20, RT 4/17/06 at 9-10, RT 4/19/06 at 90-91.) As in the first trial, the expert testimony failed to utilize the photographs in any manner relevant to the issues before the jury. (RT 4/19/06 at 94-114, RT 5/1/06 at 14-73.) However, the prosecutor extensively used these gruesome photographs in his closing argument during the penalty phase when imploring the jury to compare and weigh Appellant's mitigation against the murder. (RT 5/18/06 at 70-72, displaying on the Elmo exhibits 43, 50, 51 and especially emphasizing exhibit 84.)

While photographs of a victim's body are often relevant "because the fact and cause of death are always relevant in a murder prosecution," *State v. Spreitz*, 190 Ariz. 129, 142, 945 P.2d 1260, 1273 (1997), the same conclusion does not apply in this trial where the fact and cause of death were not at issue. The trial court recognized that these photographs (especially exhibit 84) were very upsetting and not relevant to the cause of death issue. The court erred, however, by admitting the photos in the aggravation and penalty phases for the photographs were not relevant to any alleged aggravator since cruelty focuses on the victim's pain *after* infliction of a wound but prior to death, and heinousness and depravity focus on the *38 defendant's state of mind "at the time of the offense." *State v. Anderson (Anderson II)*, 210 Ariz. 327, ¶¶91, 120-21, 111 P.3d 369 (2005). Nor were the photos relevant as to whether Appellant killed the victim since neither the ME or blood spatter expert utilized these photos or could opine that they indicated who killed the victim.

When the photographs "have no tendency to prove or disprove any question which is actually contested, they have little use or purpose except to inflame and would usually not be admissible." *State v. Chapple*, 135 Ariz. 281, 288, 660 P.2d 1208, 1215 (1983). Thus, if gruesome or inflammatory photographs are "admitted for the sole purpose of inflaming the jury, [this Court] will reverse on appeal." *State v. Gerlaugh* (*Gerlaugh I*), 134 Ariz. 164, 169, 654 P.2d 800 (1982).As evidenced by the use of these photographs by the prosecution throughout the two trials, the sole purpose of these exhibits was to convince the jury to convict Appellant and impose death on an improper basis. The State succeeded. Appellant's convictions and sentences should now be vacated.

5. The failure to instruct the jury on the lesser included offense of second degree murder was structural error.

STANDARD OF REVIEW: This Court reviews *de novo* whether the trial court has properly instructed the jury on the law in a capital case. *State v. Glassel*, 211 Ariz. 33, 53,¶74, 116 P.3d 1193, 1213 (2005). The Court *39 reviews for an abuse of discretion whether the trial court erred in giving or refusing to give a requested jury instruction. *State v. Anderson* (Anderson II), 210 Ariz. 327, 343,¶60 111 P.3d 369, 385 (2005).

A trial court must give a lesser-included instruction if an offense is in fact a lesser included offense of another and the evidence supports giving the lesser-included instruction. *State v. Miranda*, 200 Ariz. 67, 22 P.3d 506 (2001); *State, v. Govan*, 154 Ariz. 611, 615, 744 P.2d 712, 716 (App. 1987). Rule 23.3, *Arizona Rules of Criminal Procedure*, requires that a trial court submit forms of verdict "for all offenses necessarily included in the offense charged."

At the conclusion of the guilt phase Appellant requested that the Court give the jury a lesser included instruction on second degree murder. The State objected. The trial court refused the request based upon its opinion that there was no evidence that the person that cut the victim's throat did not premeditate. (RT 11/29/05 at 60-63.)

In a capital case the judge must consistent with the Eighth and Fourteenth Amendments instruct the jury on all noncapital lesser included offenses supported by the evidence. *Beck v. Alabama*, 447 U.S. 625, 627 (1980).

*40 In the instant matter Appellant's conviction and death sentence must be overturned as the evidence was inconclusive as to how the victim was killed in this case. There was no eyewitness testimony and no confession introduced in this case. Therefore there was no evidence as to how long the victim was tied up prior to his neck being cut or exactly what occurred prior to the fatal act. Contrary to the trial court's conclusion, the evidence supported a jury finding that the killer did not premeditate prior to the slitting the victim's throat.

Moreover, in resolving Appellant's request here the court ignored the act that it instructed the jury on the State's request on accomplice liability. (RT 11/29/05 at 70-71.) Therefore, the fact that Appellant was alternatively charged with felony murder is not decisive in this case, *see, State v. Sharp*, 193 Ariz. 414, 422-23, ¶¶28-29, 973 P.2d 171 (1999), as there were two defendants involved here and the jury could have believed that the victim was killed without premeditation by the codefendant and Appellant was an accomplice to that act. Absent such a choice, however, the jury was inappropriately forced with the unconstitutional alternative of finding him guilty of the capital crime of felony murder rather than "set[ting] the defendant free with no punishment at all." *See,* *41 *Schad v. Arizona*, 501 U.S. 624, 646 (1991). The trial court's refusal to so instruct the jury is reversible error. *See, State v. Krone*, 182 Ariz. 319, 897 P.2d 621 (1995).

6. The (F)(6) aggravator jury instruction was incomplete and improperly reduced the State's burden of proof. The jury instructions failed to adequately define and narrow the facially vague terms "especially heinous or depraved" in violation of the Eighth and Fourteenth Amendments. [9]

9 Appellant recognizes that this Court has rejected the argument that after *Ring v. Arizona* the (F)(6) aggravator is always vague. *E.g, State v. Johnson*, 212 Ariz. 425, ¶19-23, 133 P.3d 735 (2006); *Anderson II*, 210 Ariz. at 352-53, 111 P.3d at 394. Appellant maintains nonetheless that this Court's decisions on this point are in error since a jury has no experience or information from which to determine whether any murder is "above the norm" or "especially cruel, heinous or depraved." *See, Maynard v. Cartwright*, 486 U.S. 356, 364 (1988). (See Summary Issues *infra.*)

STANDARD OF REVIEW: This Court reviews de novo whether the trial court has properly instructed the jury on the law in a capital case. *State v. Glassel*, 211 Ariz. 33, 53,174,116.P.3d 1193, 1213 (2005). The Court reviews for an abuse of discretion whether the trial court erred in giving or refusing to give a requested jury instruction. *State v. Anderson* (Anderson II), 210 Ariz. 327, 343, ¶60, 111 P.3d 369, 385 (2005). Whether an aggravating factor is vague is a question of law reviewed *de novo. Bell v. Cone*, 543 U.S. 447, 453 (2005). A jury instruction that reduces the State' burden of proof cannot be harmless and is structural error. *Sullivan v. Louisiana*, 508 U.S. 275, 280-82 (1993).

*42 Prior to trial Appellant moved to dismiss the (F)(6) aggravator on the grounds that it was facially vague. Appellant also requested that the court instruct the jury on gratuitous violence consistent with this Court's pronouncement in *Anderson II* that "the violence committed upon the victim be *clearly* beyond that necessary to kill." *State v. Anderson (Anderson II)*, 210 Ariz. 327, 353,¶111, n. 19, 111 P.3d 369, 395, n. 19 (2005). That motion was denied. (Items 143, RT 12/6/05 at 8-12.) The court, over Appellant's objection instructed merely as follows: "In this context, gratuitous violence refers to violence committed upon the victim beyond that necessary to kill." (RT 12/6/05 at 69.) [10]

10 The trial court recognized its error and added the correct language during the second aggravation phase instructions. (RT 5/4/06 at 10-11.)

To comport with the Eighth Amendment and ensure that a proper threshold for the death penalty is met, the "state must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold." *McCleskey v. Kemp*, 481 U.S. 279, 305 (1987). Vague standards are unconstitutional because they fail to adequately "channel the sentencing decision patterns of juries." *Gregg v. Georgia*, 428 U.S. 153, n. 46 (1976).

"[A]n ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous.'" *Maynard v.* *43 *Cartwright*, 486 U.S. 356, 364 (1988) (quoting *Godfrey v. Georgia*, 446 U.S. 420, 428-429 (1980)). How the jury will interpret this factor can "only be the subject of sheer speculation." Godfrey, 446 U.S. at 429 (discussing the aggravating factor of "outrageously or wantonly vile, horrible and inhumane"). "Vague terms do not suddenly become clear when they are defined by reference to other vague terms." *Cartwright v. Maynard*, 822 F.2d 1477 at 1489 (10th Cir. 1987), aff'd *Maynard v. Cartwright, supra.*

"[T]here is no serious argument that Arizona's 'especially cruel, heinous or depraved' aggravating factor is not facially vague." *Walton vr Arizona*, 497 U.S. 639, 653 (1990) *overruled on other grounds Ring v. Arizona*, 536 U.S.584 (2002). The only way that the (F)(6) can now withstand constitutional scrutiny is "by jury instructions that follow this Court's constructions." *State v. Hampton*, 213 Ariz, 167, ¶36, 140 P.3d 950 (2006).

The court's definition of "gratuitous violence" did not track this Court's limiting constructions. *See, State v. Stokley*, 182 Ariz. 505, 518, 898 P.2d 454 (1995) ("gratuitous violence [is that] which *clearly* could not have been calculated to lead to death"); *Anderson II*, 210 Ariz. at 355, ¶124 ("*grossly* in excess of that required to kill").

*44 As written, therefore, this instruction simply used additional vague terms to define the facially vague terms of heinous or depraved. As a result, just as in *Hampton, supra.* at ¶¶ 35-42, this Court must now strike the (F)(6) aggravating circumstance.

7. The failure to instruct the first jury that it could not vicariously find Appellant responsible for the (F)(6) aggravator was fundamental error.

STANDARD OF REVIEW: This Court reviews de novo whether the trial court has properly instructed the jury on the law in a capital case. *State v. Glassel*, 211 Ariz. 33, 53, ¶74, 116 P.3d 1193, 1213 (2005). If a party fails to object to an error or omission in a jury instruction the error may be reviewed for fundamental-error. *State v. Valenzuela*, 194 Ariz. 404, 405, ¶2, 984 P.2d 12 (1999).[11]

11 Under this Court's jurisprudence: "Fundamental occurs when the defendant loses a 'right essential to his defense', was unable to receive a fair trial, or where the error goes to the 'very foundation of [defendant's] theory of the case." *State v. Valenzuela*, 194 Ariz. 404, ¶15, 984 P.2d 12 (1999). Fundamental error is "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *State v. Henderson*, 210 Ariz. 561, ¶19, 115 P.3d 601 (2005). "To obtain relief under the fundamental error standard of review" a defendant must "establish both that fundamental error exists and that the error in [the] case caused him prejudice." *Id.* at ¶20. In all further issues involving fundamental error, in the interests of both brevity and acknowledging the strictures imposed upon the length of appellate briefs, Appellant will not repeat this citation of the law but merely refer to this footnote and now well settled Arizona law.

*45 A death sentence requires much more than mere presence at the crime scene for a defendant who is not the actual killer. This Court has limited the reach of vicarious liability for aggravating circumstances when the defendant is not the actual killer and requires much more than required under general principals of accomplice liability. In *State v. Carlson*, 202 Ariz. 570, 583, ¶¶ 47, 49, 43 P.2d 1180, 1193 (2002) this Court stated:

In capital cases involving accomplices, a better test than mere foreseeablity of suffering is a finding that the defendant intended that the murder be committed in such a manner as to cause the victim to suffer or, absent intent, knew it would be so.

There is no vicarious liability for cruelty in capital cases absent a plan intended or reasonably certain to cause suffering. The plan must be such that suffering before death must be inherently and reasonably certain to occur, not just an untoward event.

The first jury was not instructed consistent with these bedrock principles and therefore found Appellant liable for the (F)(6) aggravator under mere tort forseeabilty principles. This is evident since the trial court's instruction on the cruelty prong provided in relevant part that:

> A crime is committed in an especially cruel manner when a defendant either *knew or should have known* that the manner in which the crime is committed would cause the victim to experience physical pain and/or mental anguish before death.

*46 (RT 12/6/05 at 68) (emphasis added.) The court's instructions therefore permitted the jury to find the (F)(6) aggravator proven by what is expressly prohibited by *Carlson*. There is little debate that the failure to give this instruction was error. Arizona Capital RAJI 1.0.1 Accomplice Liability.explicitly recommended this instruction at the time of both of Appellant's trials. The trial court with the approval of the State gave this instruction at the second trial but refused to strike the first jury's determination that the murder was cruel and heinous upon Appellant's motion. (Items 410, 445, 457, RT 5/3/06 at 45-50, RT 5/4/06 at 10-11.)

A capital defendant clearly has as a fundamental right under the Fifth, Sixth, Eighth and Fourteenth Amendments to an accurately instructed jury that will judge his individual culpability rather than that of his codefendant's conduct. *Taylor v. Kentucky*, 436 U.S. 478 (1978); *State v. Isa*, 850 S.W.2d 876, 902-03 (Mo. 1993)(en banc) ("Although it is permissible to find a person guilty of murder for acts done in concert with another, it is never permissible to sentence a person to death for acts of another." *See, Lockett v. Ohio*, 438 U.S. 586,605 (1978)("[A]n individual decision is essential in capital cases.")) The error here was fundamental and requires reversal of Appellant's sentence.

*47 **8. The jury instructions defining the Enmund/Tison predicate were incomplete and inaccurate in violation of the Eighth and Fourteenth Amendments.**

STANDARD OF REVIEW: This Court reviews *de novo* whether the trial court has properly instructed the jury on the law in a capital case. *State v. Glassel*, 211 Ariz. 33, 53,174, 116 P.3d 1193, 1213 (2005). The Court reviews for an abuse of discretion whether the trial court erred in giving or refusing to give a requested jury instruction. *State v. Anderson (Anderson II)*, 210 Ariz. 327, 343,¶60, 111 P.3d 369, 385 (2005). A jury instruction that reduces the State' burden of proof cannot be harmless and is structural error. *Sullivan v. Louisiana*, 508 U.S. 275, 280-82 (1993).

A defendant cannot, consistent with the Eighth Amendment, be sentenced to death for felony murder unless he personally killed, attempted to kill or intended that lethal force be employed, *Enmund v. Florida*, 458 U.S. 782, 797 (1982) or was a major participant in the underlying felony and acted with reckless indifference to human life, *Tison v. Arizona*, 481 U.S. 137, 158 (1987). The Supreme Court has made clear that the term "reckless indifference to human life" means the defendant's actual knowledge rather than that of a reasonable person. *Id.* at 152. *See also, People v. Proby*, 60 Cal.App.4th 922, 928, 70 Cal.Rptr.2d 706 (1998) ("The term 'reckless indifference to human life' means 'subjective awareness of the grave risk to *48 human life created by his or her participation in the underlying felony.'") (quoting *People v. Estrada*, 904 P.2d 1197 (Ca 1995)).

Consistent with this understanding of *Tison, Arizona* Capital RAJI 1.0 Degree of Participation Instruction [12] specifies that the jury must determine as follows before finding reckless indifference proven:

12 See footnote to Capital RAJI 1.0.

A defendant acts with "reckless indifference" to human life when that defendant knowingly engages in criminal activities known to carry a grave risk of death to another human being. The defendant's culpability ultimately rests upon *whether the defendant was aware or believed* the defendant's acts were likely to result in the death of a person. A finding of "reckless indifference" cannot be based solely upon a finding that the defendant was present at the time of the killing, merely participated in a crime resulting in a homicide or failed to render aid to the victims or call for help. (emphasis added.)

Appellant requested that the jury be so instructed. [13] The trial court rejected the request and instead instructed the jury as follows:

13 The record makes clear that defense counsel provided the court and State with a proposed instruction that included the subjective awareness element and also listed additional factors relevant to whether Appellant was a "major participant." The court indicated that it had the copies and considered the . submittal but that they still needed to be filed. (RT 12/6/05 at 12.) The ROA does not reflect that these requested instructions were ever filed.

A defendant acts with reckless indifference when the defendant knowing engages in criminal activities that he is aware will likely create a grave risk of death to others. A finding of reckless indifference cannot be based solely upon a finding that the defendant was present at the time of the killing and/or failed to render aid to the victim. (RT 12/6/05 at 62.)

*49 In this highly circumstantial case which lacked any direct evidence of Appellant's guilt this error was structural as it reduced the State's burden of proof and permitted death eligibility on the basis of what a reasonable defendant "should have known" rather than what Appellant actually knew. The error cannot in this case be deemed harmless [14] as the jury's verdicts in the guilt and aggravation phases (and its comments when it hung on penalty as quoted above at page 1) reflect that there was considerable doubt whether Appellant participated in the killing of the victim. The fact that only 8 of the 12 jurors believed Appellant actually killed the victim and 5 believed he killed with premeditation (Items 308 & 318) make this critical issue and the jury's unguided decision subject to reasonable doubt and now subject to reversal.

14 This Court cannot consistent with *Ring II* and Appellant's Sixth and Eighth Amendment rights now supplant the jury as the finder of fact on this issue and deem this error harmless. *See, Valerio v. Crawford*, 306 F.3d 742 (9th Cir. 2002) (Refusing to permit Nevada Supreme Court from "engaging in *de novo* fact-finding when the penalty phase fact finder has been a jury.")

9. The State failed to prove to either jury that Appellant qualified for the death penalty under Enmund and Tison.

STANDARD OF REVIEW: This Court reviews *de novo* whether the evidence supports findings of an aggravating circumstance. *Anderson II*, 210 Ariz. at 354, ¶119, 111 P.3d at 396. See also, ARS §13-703.04. The State must prove all facts necessary for imposition of the death penalty, including *50 the *Enmund/Tison* predicate to a jury beyond a reasonable doubt. ARS § 13-703.01(P). *See, State v. Tison*, 160 Ariz. 501, 774 P.2d 805 (1989).

In this case the first jury found insufficient evidence to unanimously conclude the State proved any of the *Enmund* circumstances but unanimously found the Tison reckless indifference circumstance. (RT 12/7/05 at 22-23,Item 319.) The record, however, fails to support this conclusion as there was no evidence that verified that Lynch was a major participant or acted with reckless indifference. As a result, Lynch's death sentence must be vacated in violation of the Eighth and Fourteenth Amendments.

First, as discussed above there was no direct evidence as to who killed the victim and the jury so found in rejecting the *Enmund* findings. The State's blood spatter expert could only opine that the victim was bleeding and the shoes purportedly worn by Appellant were near enough to the victim to be spotted with blood *after* the victim's neck was cut. The expert could not opine beyond the fact that the shoes were behind the victim's chair when spotted with blood. Significantly, he could not opine what the person was doing that was wearing the shoes were splashed with blood, nor from all of the evidence conclude that Appellant was the person who cut the victim's throat. (RT 11/22/05 at 29-34, 47-48.) The evidence just as easily supported *51 a conclusion that Sehwani tied up the victim and cut his throat and Lynch walked in to the room at that point got blood on his shoes. Such speculative evidence does not prove beyond a reasonable doubt that defendant subjectively knew Sehwani would kill the victim.

There was also absolutely no evidence as to who did what during the alleged burglary/robbery other than reflected by Sehwani's actions after the incident when he alone used the victim's credit and debit cards to replace his discarded shoes and wardrobe and obtain further goods and services. (*See supra* at 10-15.) There was also no evidence of any prior conduct by either defendant from which it could have rationally concluded that he was consciously aware of a significant risk that violence might occur. *See, State v. Lacy*, 187 Ariz. 340, 352, 929 P.2d 1288, 1300 (1996). ("[I]t is problematic to conclude beyond a reasonable doubt that a defendant exhibited reckless indifference when there are multiple suspects, no eyewitnesses, and minimal physical evidence.") Appellant's death sentence must now be vacated.

10. The State failed to prove beyond a reasonable doubt to either jury the (F)(5) and (F)(6) aggravating circumstances.

STANDARD OF REVIEW: This Court reviews *de novo* whether the evidence supports findings of an aggravating circumstance. *Anderson II*, 210 Ariz. at 354, ¶119, 111 P.3d at 396. See also, ARS §13-703.04. The State *52 must prove any aggravating circumstance beyond a reasonable doubt. ARS § 13-703(B). Due Process protects a defendant against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged. *In re Winship*, 397 U.S. 358 (1970).

A. The State failed to prove that the murder was especially cruel.

Proof that a murder is "especially cruel" requires substantial evidence that there was the "infliction of pain in an especially wanton, insensitive or vindictive manner." *State v. Stokely*, 182 Ariz. 505, 517, 898 P.2d 454, 466 (1995). To prove cruelty the State must first prove the victim was conscious and actually suffered physical pain or emotional distress *at the time of the offense*. *State v. Mann*, 188 Ariz. 220, 226, 934 P.2d 784 (1997). The evidence of suffering or pain must be apparent from the record. *State v. LaGran* 153 Ariz. 21, 36, 734 P.2d 563 (1987). To establish cruelty by mental anguish the State must show the victim experienced "significant uncertainty about his or her ultimate fate." *State v. Tucker*, 215 Ariz. 298, 311,133, 160 P.3d 197 (2007).

A finding of cruelty requires *conclusive* evidence that the victim was conscious during the infliction of violence. *State v. Doerr*, 193 Ariz. 56, 67, 969 P.2d 1168 (1998); *State v. Towery*, 186 Ariz. 168, 188, 920 P.2d 290 (1996): When the evidence is inconclusive about whether the victim was *53 conscious during, the sentencer may not find cruelty. *State v. Schackart*, 190 Ariz. 238, 248, 947 P.2d 315 (1997); *State v. Spreitz*, 190 Ariz. 129, 945 P.2d 1260 (1997). A murder is not cruel whenever a victim remains conscious for some moments after being attacked. *State v. Soto-Fong*, 187 Ariz. 186, 203, 928 P.2d 610 (1996).

In this case the evidence on this issue was primarily provided by the ME who testified during the first trial that the single inflicted knife wound quickly led to the victim's unconsciousness followed almost immediately by death. Dr. Keen initially opined that following the infliction of the wound the victim would have lost consciousness in "a minute or so" and would not have lived longer than 2 to 3 minutes total. (RT 11/21/05 at 29-30.) During the aggravation phase Dr. Keen admitted that he could not estimate how long the victim was conscious after having his throat slit but it was certainly a "short period of time" and "not more than a minute." He indicated that the victim likely died within "30 seconds." Dr. Keen opined that the victim would have felt pain on his skin from the cut itself but otherwise would not have experienced any pain. (RT 12/6/05 at 44-45, 49-51, see also RT 4/19/06 at 95-95, 116.)

The evidence in this record cannot consistent with this Court's precedent support a finding that the murder was *especially* cruel. First, there *54 was no evidence from any source as to how long the victim was tied up before the killer slit his throat. The fact that the victim was restrained for an undetermined time prior to death does not support this finding. *See, State v. Prince*, 206 Ariz. 24, 27, 75 P.3d 114 (2003) ("few especially cruel findings [ ] are predicated solely on an inference that the victim contemplated his or her fate," especially when no witness "can quantify the length of time between the point at which [the victim] first experienced mental anguish and the moment" the fatal wound was inflicted.) Cf., *State v. Moody*, 208 Ariz. 424, 471, ¶¶222-26, 94 P.3d 1119 (2004). *See also. Soto-Fong*, 187 Ariz. at 204-05 (finding inconclusive evidence of what occurred inside the store between when defendant entered and victims were killed to conclude they suffered cruelty.)

Second, as the medical examiner's testimony is inconclusive as to whether the victim was conscious and suffering pain *after* the wound was inflicted it cannot be concluded beyond a reasonable doubt that he suffered pain sufficient to find the murder especially cruel. *See, State v. Gillies*, 135 Ariz. 500, 513, 662 P.2d 1007 (1983) ("Where the evidence is inconclusive as to whether a victim was conscious during the infliction of violence to his person, the sentencing court cannot find that cruelty existed.")

*55 If the Court upholds the cruelty finding in this case than it is sanctioning such a finding in every case that involves restraining the victim and quickly ending their life. Such a holding would render superfluous the "especially" component of the aggravator and violate the Eighth Amendment by imposing a standardless automatic death sentence in very murder case

involving prior restraint. *McCleskey v. Kemp*, 481 U.S. 279, 305 (1987); *Lowenfield v. Phelps*, 484 U.S. 231 (1988); *Zant v. Stephens*, 462 U.S. 862, 877 (1983). *See also, Ellison*, 213 Ariz. at ¶121, fn19 ("unwilling to stay that all stranglings are per se cruel") The (F)(6) aggravator cannot be upheld based upon especial cruelty in this case.

B. The State failed to prove that the murder was especially heinous or depraved.

. After the State's presentation of evidence at the first aggravation trial Appellant moved for a directed verdict and specifically pointed out that there was a single knife wound that quickly led to unconsciousness and death and therefore no evidence of either gratuitous violence or mutilation as asserted by the State. The ME testified both during the guilt phase and aggravation phase that the wound was caused by a single action of the knife with two tugs of the blade. The ME further opined that any additional minor bruising. on the victim's torso was caused by being tied to the chair and occurred "at the time of death" or at the least "minutes" before death and the ligature *56 from being tied up was not so tight as to "impede circulation." (RT 11/17/05 at 83-87, 97-98, RT 11/21/05 at 26-28, 39, RT 12/6/05 at 49-52.)

The State contested the motion and the court agreed and held that the violence could be considered "gratuitous" based upon the fact that the victim was tied to the chair prior to his throat being slit. (RT 12/6/05 at 55-57.) The State then argued contrary to Arizona law in closing that: "He went beyond that. He tied him up. That makes this gratuitous." (Id. at 80-81.) The jury thereafter found the murder heinous but hung on whether it was depraved. (Item 319.)

At the second trial on identical medical testimony was presented and the ME added that he did not see the victim's wounds as being gratuitous or involving mutilation. Instead, the ME stated: "I see [it] as a lethal wound not a torture wound." (RT 4/19/06 at 90-98, 108-09, 114.) This time the court granted Appellant's motion for directed verdict as to mutilation (since there was no evidence that the victim was deceased when the wound was inflicted) but for identical reasoning as in the first trial denied the motion as to gratuitous violence. (RT 5/3/06 at 54-58.) The prosecutor repeated his prior argument that tying the victim to the chair equated with gratuitous violence. (RT 5/4/06 at 13-14.) The second jury found depravity proven based upon this misstatement of Arizona law. (RT 5/8/06 at 3.)

*57 A finding of mutilation *requires* some demonstration that the defendant committed "distinct acts, *apart from the killing itself* that evidence a 'separate purpose to mutilate the corpse.'" *State v. Pandeli* (Pandeli I), 200 Ariz. 365,¶40, 26 P.3d 1136 (2001) (internal citations omitted). The absence of any evidence in the record that the victim was deceased and the killer knew or should have known he was dead when any wound was inflicted makes clear that neither the heinous or depravity prong verdicts can be upheld based upon mutilation. *See, State v. Bocharski (Bocharski II)*, __Ariz. __,¶84,__ P.3d__ (2008).

"Gratuitous violence [is that] which clearly could not have been calculated to lead to death," *State v. Stokley*, 182 Ariz. 505, 518, 898 P.2d 454 (1995), and which is "grossly in excess of that required to kill". that to prove gratuitous violence, like mutilation, the State must prove that the "defendant continued to inflict violence *after he knew or should have known that a fatal action had occurred." Id.* at ¶ 87 (emphasis in original) (citations omitted.) As there was no evidence presented at either trial that other than a single wound led quickly to the victim's death and the killer tied the victim up *before* a fatal wound (or for that matter any wound) was *58 inflicted neither the heinous nor depravity prong of the (F)(6) aggravator can be upheld based upon gratuitous violence.

C. The State failed to prove that Appellant's motive for the murder was pecuniary gain.

The first jury hung on the (FX5) aggravator. (Item 319.) The trial court denied Appellant's motion for directed verdict at the second trial and the jury thereafter found the aggravator proven. (RT 5/3/06 at 54-58, Item 448.)

To establish the pecuniary gain aggravator the state must prove that "the expectation of pecuniary gain was a motive, cause, or impetus for the murder and not merely a result of the murder." *State v. Hyde*, 186 Ariz. 252, 280,921 P.2d 655,683 (1996). In

other words, there must be proof "that the murder would not have occurred but for the defendant's pecuniary motive." *State v. Ring (Ring III)*, 204 Ariz. 534, 560,¶, 65 P.3d 915, 941 (2003). Proving a taking in a robbery or the existence of some economic motive at some point during the events surrounding the murder does not necessarily prove the motivation for the murder. *State v. Medina*, 193 Ariz. 504, 513, 975 P.2d 94, 103 (1999). A "robbery gone bad" or "robbery that occurs close in time to a murder but that constitutes a separate event" is not a murder committed in the expectation of pecuniary gain. *State v. Sansing*, 200 Ariz. 347, 353-54,¶, 26 P.3d 1118, 1124-25 (2001).

*59 The State's sole argument as to why the evidence proved that Lynch's motive was for pecuniary gain was that he controlled the victim's American Express card, gun and keys to his Lexus. (RT 5/4/06. at 34.) This argument, however, is not supported by substantial evidence in the record and even if so considered does not prove the (F)(5) aggravator under Arizona law. For it was at no point established that the murder was necessary and used to accomplish the burglary/robbery, rather than the murder actually being committed after the burglary/robbery was complete. The State, in fact, argued as much in both trials by stressing that the murder was senseless as it was unnecessary to accomplish the burglary/robbery. (RT 12/1/05 at 71-88, RT 5/4/06 at 13-53.) It is now illogical to conclude that the murder was committed to accomplish any pecuniary motive.

More importantly, the evidence simply does not support concluding that it Lynch's motive (as opposed to Sehwani's) was for pecuniary gain. The evidence indicated that the victim called in his American Express card as lost *prior* to the murder so even if Lynch at one point had the card in his possession prior to the murder it is insufficient to prove his motive later was for pecuniary reasons. Moreover, the evidence uniformly indicated that it was Sehwani that controlled and used all of the victim's credit cards up to the time he was arrested and his wallet containing the cards was confiscated *60 by police. In contrast, Lynch's wallet had none of the victim's cards and there was no evidence that Lynch ever used the cards. (See pages 11-13 *supra*, and especially RT 11/16/05 at 32-43, 58-66, RT 11/10/05 at 29-40, 52-53, RT 4/18/06 at 14-28 (indicating that Sehwani tried to use the credit card at ABCO Market at 7:20 am on March 25, 2001 and victim called in as lost at 7:25 am), RT 4/20/06 at 11-20 (Sehwani's wallet included victim's cards.))

The evidence as to who controlled the victim's keys and gun was also inconclusive at both trials. The arresting officers testified that the gun was found under one mattress and the clip to the gun under the other mattress in the Motel 6 room. There was also no testimony or evidence relating to which defendant slept in which bed nor any forensic evidence tying Lynch to the weapon. (RT 11/17/05 at 4-7, RT 4/19/06 a 38, 43-46.)

The evidence pertaining to Appellant's asserted control over the victim's Lexus keys was also insubstantial. Lynch was arrested when he walked out of the Motel 6 towards the passenger side of the truck. A search of the truck revealed the keys lying on the floor on the passenger's side of the truck. (RT 4/20/06 at 20, exhibit 236. See also, RT 11/17/05 at 36.) This evidence fails to prove that Lynch controlled the victim's property as both men had access to the pickup truck and there was no evidence that either *61 man possessed or drove the Lexus. Such inconclusive evidence cannot in a death case support a conclusion that Appellant controlled the keys.

The first jury correctly hung on the (F)(5) aggravator on more thorough evidence than that presented to the second jury which somehow found the foregoing evidence sufficient to establish that Lynch's motive was for pecuniary gain. This holding cannot be sustained on this record under this Court's precedent. *See, State v. Sansing*, 200 Ariz. 347, 353, 26 P.3d 1118 (2001) (Reversing (F)(5) finding and noting that "[t]he murder, which occurred at least an hour after the victim's arrival, did not facilitate the defendant's ability to secure pecuniary gain, particularly in light of the fact that he bound the victim almost as soon as she entered his home."); *State v. Milke*, 177 Ariz. 118, 127, 865 P.2d 779 (1993) ("Because conflicting inferences can be drawn from the evidence on pecuniary gain, we conclude that the state did not establish that factor beyond a reasonable doubt.").

11. Arizona's death penalty scheme violates the Eighth and Fourteenth Amendments by not requiring that once a defendant proves mitigating circumstances exist that the State proved beyond a reasonable doubt that the mitigation is not sufficiently substantial to call for leniency and that death is the appropriate sentence.

STANDARD OF REVIEW: All legal and constitutional questions are reviewed de novo. *State v. McGill*, 213 Ariz. 147, 156, 159, ¶¶ 40, 53, 140 P.3d 930, 939, 942 (2006).

*62 Arizona law does not require, and the jury was therefore not instructed, that once a defendant has proven some mitigation that the burden shifts to the Stateto prove that it is insufficient to call for leniency and that death is the appropriate sentence. Appellant submits that in light of post *Ring II* jurisprudence such a requirement is now constitutionally mandated.

Appellant recognizes that this Court has previously rejected the argument that Arizona's death penalty statute is unconstitutional because it mandates a sentence of death when the State proves one or more aggravating circumstances and no mitigating circumstances exist. *State v. Miles*, 186 Ariz.10, 19, 918 P.2d 1028, 1037 (1996). It is further conceded that the Supreme Court has held it constitutionally permissible to allocate upon a capital defendant "the burden of *proving* mitigating circumstances sufficiently substantial to all for leniency." *Walton v. Arizona*, 497 U.S. at 650. The present issue is somewhat more precise and narrow.

In *State v. Gulbrandson*, 184 Ariz. 46, 72, 906 P.2d 579 (1995) this Court first rejected the argument that the death statute is unconstitutional because it fails to "require that the State prove that death is appropriate." The Court indicated that this issue did not "warrant extended discussion" because it had been "previously decided adversely to him." *Id.* More recently, in *63 *State v. Glassel*, 211 Ariz. 33, 52, ¶¶ 69-70, 116 P.3d 1193 (2005) this Court addressed this issue in light of *Ring II* and again rejected it reasoning that that the *Ring* Court did not overrule that part of *Walton* that sanctioned allocating the burden on the defendant "to prove the existence of mitigating circumstances sufficiently substantial to call for leniency" as long the law "did not lessen the State's burden to prove every element of the offense charged." *Id.* (quoting *Walton*, 497 U.S. at 650.) Implicit in this Court's decision was that the death penalty itself was not an "element" of the crime of capital murder. This conclusion does not end the debate.

At the time that the Court decided *Walton* it had not yet held that all elements of capital murder must be submitted to a jury under the Sixth Amendment. Even after Ring the Court has yet to specifically address whether once a state, like Arizona, submits not just the issue of aggravating circumstances (as it must) to the jury, but also the issue of mitigating circumstances and the ultimate penalty to the jury, whether the latter two factual issues now become elements of the crime of capital murder. The Court, however, has indicated most likely that they are just that and require placing the burden on the ultimate penalty on the government.

In *Kansas v. Marsh*, 548 U.S. 163, 126 S.Ct. 2416 (2006) the Court held that a Kansas statute (which it characterized as "comparable in important respects" to Arizona's) was not unconstitutional although it *64 permitted the jury to impose death if the aggravators and mitigators were in equipoise. In upholding this scheme the Court carefully noted that the government under Kansas law still had the burden of proving that the mitigators did not outweigh the aggravators and therefore the law was consistent with the holding in *Walton*. The Court stated:

> Contrary to Marsh's argument, §21-4624(e)[15] does not create a general presumption in favor of the death penalty in the State of Kansas. Rather, the Kansas capital sentencing system is dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction. If the State fails to meet its burden to demonstrate the existence of an aggravating circumstance(s) beyond a reasonable doubt, a sentence of life imprisonment must be imposed. §21-4624(e); [ ]. If the State overcomes this hurdle, then it **bears the additional burden of proving beyond a reasonable doubt that aggravating circumstances are not outweighed by mitigating circumstances.** Ibid. [ ]. Significantly, although the defendant appropriately bears the burden of proffering mitigating circumstances - a burden of production - he never bears the burden of demonstrating that mitigating circumstances outweigh aggravating circumstances. **Instead the State always has the burden of demonstrating that mitigating evidence does not outweigh aggravating evidence.** *Id.* at 2428 (internal citations omitted) (emphasis added.)

15 KSA § 21-4624(e) provides in relevant part:
"If, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances [ ] exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced to death."

*65 Thus, the Supreme Court has now held that once a state allocates all three issues to the jury it must consistent with the Eighth and Fourteenth Amendments require that the State prove beyond a reasonable doubt that the proven mitigating circumstances do not *outweigh* the proven aggravating circumstances. As Arizona has allocated these three issues to the jury its current statutory scheme is unconstitutional. Moreover, as the jury was not instructed consistent with *Marsh* the error here was structural since it improperly reduced the State's burden of proof.

12. Appellant's rights not to be subject to double jeopardy, fundamental fairness and due process and Arizona law were violated when the court permitted the State to retry the (F)(5) aggravator, the depraved prong of the (F)(6) aggravator and whether Appellant was the killer and acted intentionally.

STANDARD OF REVIEW: Whether a second trial violates double jeopardy presents a question of law which is reviewed de novo. *Schiro v. Farley*, 510 U.S. 222, 232 (1994); *State v. Rayes*, 206 Ariz. 58, 60,¶60, 75 P.3d 148 (App. 2003). An issue involving statutory interpretation is reviewed independently by this court. *State v. Ontiveros*, 206 Ariz. 539,¶8, 81 P.3d 330 (2003). This Court reviews the constitutionality of a statute *de novo* as a matter of law. *State v. Casey*, 205 Ariz. 359,¶8, 71 P.3d 351 (2003).

Prior to the second trial Appellant filed three motions seeking to preclude the State from retrying the (F)(5) aggravator and depravity prong of *66 the (F)(6) aggravator and also precluding the State from relitigating whether he was the killer and if so whether he acted intentionally and with premeditation as the first jury failed to find the State's evidence sufficient to sustain any. of these factual issues. (Items 378, 381, 383, 392, 393 & 411.) The trial court denied Appellant's motion regarding retrial of the (F)(5) and (F)(6) depravity aggravators based solely upon its interpretation of ARS § 13-703.01(K). (Item 401.)

The court initially advised the State to not argue in opening remarks that the prior jury had found Appellant guilty of premeditated or intentional murder (since the prior jury had not found either proven.) (RT 4/12/06 at 18.)[16] The trial court kept under advisement the latter motion to preclude until midway through the State's case in chief when it held that the State was precluded from arguing the murder was premeditated but that it could argue that the defendant was the one that "wielded the knife that killed the victim." (RT 4/17/06 at 110-12.) The prosecution then argued in both phases of the *67 trial that the evidence proved that Lynch killed the victim. (E.g., RT 5/4/06 at 13-14, 29-30, 36, RT 5/18/06 at 59, 71-74.)[17]

16 As discussed more fully below at Issue 17, this did not preclude the prosecutor from repeatedly referring to Lynch as a "murderer." The trial court sanctioned such hair splitting semantics and denied Appellant's motion for a mistrial after several references to Lynch being "the murderer." (RT 4/12/06 at 40-43.)

17 The second jury, however, received no *Enmund/Tison* instruction nor a verdict form to indicate whether they found Appellant death eligible.

The court's ruling was erroneously premised upon its interpretation of *Shad v. Arizona*, 501 U.S. 624 (1991) and *State v. Tucker*, 205 Ariz. 157 (2003) which hold that jury unanimity on the theory of first degree murder is not constitutionally mandated as long as all 12 jurors agree that the defendant is guilty of first degree murder. (RT 4/17/06 at 110-12.) The trial court's rulings on these issues, however, were erroneous interpretations of federal constitutional law and Arizona law and therefore an abuse of discretion.

A. Retrial of the (F)(5) and (F)(6) depravity aggravators was prohibited by statute.

When resolving issues of statutory interpretation, the court first considers the language of the statute, which provides "the best and most reliable index of a statute's meaning." *Janson v. Christensen*, 167 Ariz. 470, 471, 808 P.2d 1222 (1991). The primary goal in this instance is "to fulfill the intent of the legislature that wrote [the statute.'" *State v. Williams*, 175 Ariz. 98, 100, 854 P.2d 131 (1993). "When the plain text of a statute is clear and unambiguous there is no need to resort to other methods of statutory *68 interpretation to determine the legislature's intent because its intent is readily discernable from the face of the statute." *State v. Christian*, 205 Ariz. 64, 66,¶6, 66 P.3d 1241 (2003).

The statutes at issue here unambiguously provide in relevant part as follows:

> The penalty phase shall be held immediately after the trier of fact finds at the aggravation phase that one or more of the aggravating circumstances under section 13-703 subsection F have been proven. A finding by the trier of fact that any of the remaining aggravating circumstances alleged has not been proven *or the inability of the trier of fact to agree on the issue of whether any of the remaining aggravating circumstances alleged has been proven shall not prevent the holding of the penalty phase.*

ARS § 13-703.01(F)(emphasis added.)

> At the penalty phase if the trier of fact is a jury and the jury is unable to reach a verdict, the court shall dismiss the jury and shall impanel a new jury. The new jury shall not retry the issue of the defendant's guilt *or the issue regarding any of the aggravating circumstances that the first jury found by unanimous verdict to be proved or not proved.*

ARS § 13-703.01(K)(emphasis added.)

The plain language of these two statutes, contrary to the trial court's interpretation, indicates that the legislature has directed that once a jury reaches a verdict on one or more alleged aggravator it will determine penalty rather than result in a mistrial. If the jury is unable to reach a decision on the penalty then ARS § 13-703.01(K) controls and unambiguously states that the *69 second jury may consider only the penalty - - not the defendant's guilt, nor prior proven or unproven alleged aggravating circumstances. Here the jury found unproven the (FX5) aggravator and the (F)(6) aggravator proven. [18] Neither should have been retried under the plain language of this subsection. Had the legislature intended on permitting retrial on alleged aggravators that the jury could not reach a verdict on then it would have so stated. The absence of such language indicates its intent which is contrary to the court's ruling in this case.

18 The (F)(6) aggravator is worded in the disjunctive but is only one aggravating circumstance. As the jury had already found cruelty and heinousness proven (and thereby the (F)(6) aggravator proven) it was a direct violation of ARS § 13-703.01(K) to permit the second jury to consider depravity (and therefore the (F)(6) aggravator) again since it is demonstrated by the same facts as heinousness. *See, State v. Gretzler*, 135 Ariz. 42, 52, 659 P.2d 1(1983).

B. Retrial of the (F)(5) and (F)(6) depravity aggravators was a violation of the Fifth and Fourteenth Amendments.

In *Bullington v. Missouri*, 451 U.S. 430 at 438 (1981) and *Arizona v. Rumsey*, 467 U.S. 203 at 209 (1984) the Supreme Court held that capital sentencing proceedings are trials for purposes of the Double Jeopardy Clause. In *Ashe v. Swenson*, 397 U.S. 436 (1970) the Court held that the Double Jeopardy Clause encompasses the doctrine of collateral estoppel. Ashe confirmed that in the criminal context collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a *70 valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.* at 443.

In order to successfully invoke collateral estoppel, a party must demonstrate: (1) that the issue in question was actually raised and litigated in the prior proceedings; (2) that the determination was critical and necessary part of the final judgment in the earlier litigation; (3) that the issue in the later proceeding is the same as that involved in the prior action and (4) there is a mutuality of parties. *State v. Jimenez*, 130 Ariz. 138, 140, 634 P.2d 950, 952 (1981); *State v. Rodriguez*, 198 Ariz. 139,15, 7 P.3d 148 (App. 2000). The Supreme Court has instructed that to resolve these issues requires that the court "examine the record of the prior proceedings, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rationale jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Ashe*, 397 U.S. at 444:

The record from the first trial in this case makes clear that the (F)(5) and (F)(6) aggravators were squarely at issue and with the exception of cruelty and heinousness squarely resolved against the State. The issues were resolved by the jury's final judgment that only the (F)(6) aggravator had been proven beyond a reasonable doubt. The trial court's ruling permitting *71 the State to relitigate these issues violated the Double Jeopardy Clause since the identical issues were retried utilizing the identical (although more limited in some respects) evidence by the same parties.

C. Retrial of the *Enmund/Tison* issue was a violation of the Fifth and Fourteenth Amendments.

The foregoing analysis of collateral estoppel is even clearer as it pertains to the retrial of whether Lynch was the killer and acted intentionally. The first jury rejected the State's evidence on premeditation and intentional murder when it found Lynch guilty of only felony murder As discussed above, the jury was not presented with the intentional murder. Not only did the jury find the State's evidence insufficient to prove that Lynch committed intentional murder, but it emphatically rejected all Enmund factors and thereby acquitted Appellant of being the person who murder the victim

Schad and Tucker do not resolve this issue. The Court in *Schad* held that jury unanimity is not required on which theory of first degree murder as long as it is unanimous that the defendant is guilty of first degree murder. 530 U.S. at 645. This Court reaffirmed the Schad holding in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Tucker*, 205 Ariz. at 166-67. The trial court's reliance on *Schad* misses the limitation of the Court's *72 holding and also ignores the effect of a conviction for purposes of double jeopardy. Since there is only one crime of first degree murder, *State v. Arnett*, 158 Ariz. 15, 19, 760 P.2d 1064 (1988), Lynch had already been convicted of the crime of first degree murder and could not be retried on that offense without violating the Double Jeopardy Clause. See, *State v. Brown* defendant is convicted more than once for the same offense, his double jeopardy rights are violated even when, as in the current case, he receives concurrent sentences.")(quoting and citing *Bell v. United States*, 470 U.S. 856, 864-65 (1985). See also, In re Snow, 120 U.S. 274 (1887)(double jeopardy precludes trying a defendant for the same crime after conviction).

The trial court also failed to recognize that after the first jury returned its guilty verdict on felony murder the court did not declare a mistrial. Rather, the first degree murder conviction became final as did its acquittal of premeditated murder. As a result, the acquittal foreclosed a subsequent trial. on that charge since it was rejected based upon the State presenting insufficient evidence. *See, Burks v. United State*, 437 U.S. 1, 11 (1978) (The Double Jeopardy clause "forbids a second trial for the purposes of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.") By retrying Appellant for first *73 degree premeditated murder the State violated the prohibition against double jeopardy.

Finally, the trial court ignored the effect of the jury's findings of fact on the *Enmund/T issue. Schad* dealt only with the crime of first degree murder and therefore has no effect on resolving this issue. Neither this Court nor the Supreme Court has indicated that the *Enmund/Tison* decision may be made by less than a unanimous jury verdict.[19] The trial court submitted a special verdict on the issue and the jury found the State's evidence insufficient to prove that Lynch killed the victim. The jury found unanimously only that Appellant was a major participant. Just as with his first degree murder conviction, there was no ambiguity in this verdict which resulted in an acquittal on the *Enmund* factors and conviction on the *Tison* factor. As with the murder conviction Double Jeopardy precluded retrying Appellant on the *Enmund* factors.

19 Appellant recognizes that the Supreme Court has held that the *Enmund/Tison* decision need not be made by a jury as a matter of constitutional law: *Cabana v. Bullock*, 474 U.S. 376 (1985). However, as Arizona has decided to submit the issue to the jury and it must constitutionally be proven beyond a reasonable doubt it makes only logical sense that just as with aggravating circumstances that may only make a defendant death eligible upon a unanimous jury verdict, so should the *Enmund/Tison* eligibility finding require a unanimous verdict. *Cf., Anderson II*, 210 Ariz. at 356-57, ¶¶132-37.

*74 Moreover, this finding was essential to the judgment that made him eligible for the death penalty. The trial court did not resubmit the issue to the second jury but instead instructed the jury from the inception the second trial that Appellant had already been determined to be eligible for the death penalty as a major participant. (E.g., RT 4/3/06 at 19, RT 4/4/06 at 31.) After unsuccessfully litigating this critical factual issue in the first trial the State was precluded under the Fifth Amendment from relitigating it before the second jury. The trial court abused its discretion.

D. The State waived its right to argue that Appellant intentionally murdered the victim.

The trial court also abused its discretion because it failed to consider the operation of the waiver doctrine on this vital issue. The rules of waiver apply with as great or greater force against the State than they do against a defendant. *State v. Palenkas*, 188 Ariz. 201, 933 P. 2d 1269 fn.3. (App 1996). This is how it should be since the State is in a greater position of power and is charged with knowing the law. The doctrine of waiver is long standing in Arizona. *Grace v. Territory*, 12 Ariz. 1, 94 P. 1108 (1908). Waiver occurs, and a party is precluded from raising a claim, when the party fails to object to the court's actions or ruling below. *State v. Norten*, 99 Ariz. 116 407 P. 2d 81 (1965).

*75 At the first trial the State had the opportunity to definitively resolve the issue of whether Appellant intentionally killed the victim by conceding his request to instruct the jury on intentional second degree murder. *See, State v. Cruz*, 189 Ariz. 29, 938 P.2d 78 (App. 1996) (Trial court must give lesser included murder instruction even where defendant objects if State requests it.) Instead, the State opposed Appellant's request, failed to object to the court's decision to deny the requested lesser instruction, and instead submitted only premeditated and felony first degree murder to the jury which rejected the latter theory. By choosing to proceed only on premeditated murder the State waived the chance to later argue that Appellant had committed intentional murder.

13. The trial court abused its discretion and violated Appellant's rights under the Eighth and Fourteenth Amendments when it precluded all evidence of future prison conditions, life imprisonment and lack of future dangerousness.

STANDARD OF REVIEW: A trial court's ruling on the admission of evidence is reviewed for an abuse of discretion. *State v. Wood*, 180 Ariz. 232, 235, 881 P.2d 1158, 1166 (1994).

Prior to trial the court granted the State's motion and precluded all evidence involving future prison conditions, life imprisonment and lack of future dangerousness. (Items 224, 225, 258, 264, RT 10/18/05 at 12-14.) While some of these issues have been addressed see, *76 *State v. Cruz*, 218 Ariz. 149, 154-55, 40-45,181 P.3d 196 (2008) (upholding the preclusion of evidence regarding a life sentence and parole eligibility), no case at this point has sanctioned the wholesale exclusion of the evidence at issue. To the contrary, this Court indicated in *State v. Pandeli* (Pandeli IV), 215 Ariz. 514,¶82, 161 P.3d 1247 (2007), by considering on the merits the defendant's controlled behavior in prison and lack of future dangerousness while incarcerated as relevant mitigating circumstances. The preclusion of this relevant evidence violated Appellant's rights to defend against the State's case for death and to have his sentencer consider all mitigating evidence.

In the instant matter the evidence at issue was clearly admissible and relevant under ARS § 13-703(G) and the Eighth Amendment. Relevance in the context of capital mitigation has a "low threshold." To be admissible the proffered evidence

need only "tend logically prove or disprove some fact or circumstance from which a fact-finder jury could reasonably deem to have mitigating value." *Tennard v. Dreke*, 542 U.S. 274, 284-85 (2004).

Where the government's case for death is premised in whole or in partupon the premise that the defendant will be dangerous in the future, that the alternative sentence of life without parole will be served under strict confinement where the defendant poses no future dangerousness to staff or *77 other inmates is obviously relevant to both rebut this argument and show why leniency is warranted. Thus, consistent with the Eighth and Fourteenth Amendments, the Supreme Court has consistently held that the jury must be able to consider and be instructed upon the defendant's parole ineligibility. *Shafer v. South Carolina*, 532 U.S. 36, (2001); *Simmons v. South Carolina*, 512 U.S. 154, 168-69 (1994). In *Kelly v. South Carolina*, 534 U.S. 246 (2002) the Court affirmed that when the alternative sentences are life in prison or death future dangerousness remains a relevant consideration as it pertains to the prison population making the *Simmons* rule equally applicable, even where a third sentencing option might be appropriate.

Other appellate courts have also held, that future dangerousness aside, that parole ineligibility evidence is independently admissible, and the jury should be so instructed, as a mitigating circumstance. *See, West v. State*, 725 So.2d 872, 879 (Miss. 1998) ("fundamental fairness requires that capital juries must have as much information as possible in front of them when making their sentencing determination" including the fact of parole eligibility); *Bruce v. State*, 616 A.2d 392, 402 (Myd. 1992); *Doering v. State*, 545 A.2d 1281, 1308-09 (Myd. 1988) ("where [ ] the defendant in a capital sentencing proceeding seeks to place before the jury relevant and *78 competent information concerning his ineligibility for parole in the event a life sentence is imposed, that request should be granted").

In this case the trial court's preclusion of all evidence pertaining to life in prison, the conditions of confinement and lack of future dangerousness was an abuse of discretion and violated Appellant's rights to present a defense to death and relevant mitigating evidence.

14. The second penalty jury's death sentence is now void since it failed to find beyond a reasonable doubt the cruel and heinous prongs of the (F)(6) aggravator and the Enmund/Tison predicate.

STANDARD OF REVIEW: All legal and constitutional questions are reviewed de novo. *State v. McGill*, 213 Ariz. 147, 156, 159, ¶¶ 40, 53, 140 P.3d 930, 939, 942 (2006). The imposition of an illegal sentence constitutes fundamental error which may be raised for the first time on appeal. *State v. Theus*, 203 Ariz. 339, ¶ 4, 54 P.3d 368 (App. 2002); *State v. Cox*, 201 Ariz. 464, 468, ¶ 13, 37 P.3d 437, 441 (App. 2002).

It is recognized that the trial court was ostensibly following Arizona law by not resubmitting the cruel and heinous prongs of the (F)(6) aggravator to the second jury. See, ARS §13-703.01(K). That statute, however, is silent as to what occurs when a jury has made an *Enmund/Tison* finding but not reached a verdict on the penalty. The statute by its terms applies only to "aggravating circumstances" so under its plain language the *79 major participant finding of the first jury was not binding on the second jury and should have been retried. Additionally, ARS §13-703.01(K) is not, as discussed above, constitutionally sound on its face or as applied in this case.

This Court's case law has not yet addressed this precise issue. However, this Court has in the completely analogous context of a remand for resentencing held that the procedure involved here is constitutionally and statutorily prohibited. In *State v. Pandeli (Pandeli IV)*, 215 Ariz. 514,1 15, 161 P.3d 1247 (2007) the defendant argued that the trial court erred by submitting the (F)(2) aggravator to the resentencing jury since the trial judge had already found his prior conviction proven beyond a reasonable doubt. The Court rejected this argument and held that "[b]ecause Pandeli's death sentence was vacated the State was obligated to re-prove the (F)(2) aggravating circumstance on resentencing." The Court has since summarized this ruling as follows: "There, we held that *even if a judge's finding of an aggravating circumstance was harmless error*, when a death sentence was vacated and remanded for resentencing, 'the State was obligated to re-prove the ... aggravating circumstance on

resentencing."' *State v. Armstrong (Armstrong II)*, Ariz.,¶29,__ P.3d (2008) *See also, Nordstrom v. Cruikshank (Nordstrom III)*, 213 Ariz. 434, 142 P.3d 1247 (App. 2006).

*80 The Court's primary support in *Pandeli IV* was ARS § 13-703.01(P) which provides that "[t]he trier of fact shall make all factual determinations required by this section or the Constitution of the United States or this state to impose a death sentence." The jury's sentence here violates Arizona law, which mandates that the jury make the *Enmund/Tison* finding, as well as the Sixth Amendment, which require that the jury find any aggravating circumstances, proven beyond a reasonable doubt.

There is no practical distinction between the present scenario, where a mistrial is granted out of manifest necessity and the first jury never determined the penalty and the case where a judge determines the penalty under a constitutionally infirm proceeding. In both instances the second fact finder's determination is incomplete and flawed and should not be binding upon the second fact finder. In both instances the Sixth Amendment mandates pursuant to *Ring II* that absent a. valid waiver the sentencing jury determine all facts necessary to make Appellant death eligible. The jury's failure to make these factual determinations here was clear error and resulted in a death sentence in violation of Appellant's Sixth Amendment rights is clearly fundamental error.

Additionally, it violates due process to permit a jury to decide whether a defendant lives or dies when it has not determined whether the State has *81 proven the defendant death eligible. The second jury, quite simply, had nothing to weigh and compare the mitigation to in this case since it had no idea why or how the prior jury's verdicts were proven. See, State ex rel. *Thomas v. Grandville (Baldwin)*, 211 Ariz. 468, 472,¶17, 123 P.3d 662 (2005) ("the jurors must assess whether to impose the death penalty based upon each juror's individual, qualitative evaluation of the facts of the case, the severity of the aggravating factors, and the quality of any mitigating evidence.")

The second jury's death sentence is therefore fundamentally flawed since it made its decision without making a valid finding that the State had proven Appellant was a major participant or that the murder was especially cruel or heinous. The jury was therefore without sufficient information to weigh the aggravator found (albeit incorrectly) by another jury against the proffered mitigation. Proceeding in such a fashion violated Arizona law and the Sixth and Fourteenth Amendments. Appellant's death sentence must now be vacated.

15. The trial court violated Appellant's rights to due process and to not to be subject to double jeopardy when it instructed the jury that it could consider the cruel, heinous or depraved prongs of the (F)(6) aggravator as three separate aggravating circumstances.

STANDARD OF REVIEW: This Court reviews *de novo* whether the trial court has properly instructed the jury on the law in a capital case. *State v.* *82 *Glassel*, 211 Ariz. 33, 53,174, 116 P.3d 1193, 1213 (2005). The Court reviews for an abuse of discretion whether the trial court erred in giving or refusing to give a requested jury instruction. *State v. Anderson (Anderson II)*, 210 Ariz. 327, 343,¶60,111 P.3d 369, 385 (2005).

Due process requires that the sentencing authority be fully and correctly instructed of its sentencing discretion and powers and what law guides this discretion prior to exercising it. *Hicks v. Oklahoma*, 447 U.S. 343, 346-47 (1980). *See also, Wade v. Calderon*, 29 F.3d 1312, 1320 (9th Cir. 1994) ("When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process.")

The ultimate duty to inform the jury regarding the law in this critical area resides solely with the court. The jury looks to the judge, not to counsel, for authoritative direction about what to do with the evidence it hears. *See, Taylor v. Kentucky*, 436 U.S. 478, 488-89 (1978)(holding that "arguments of counsel cannot substitute for instructions by the court.")

Prior to the second trial the prosecutor asked the court to instruct the jury that the first jury found *two* aggravating circumstances proven. (RT 3/16/06 at 3-6.) Notwithstanding his objections to retrial, Appellant requested that the court instruct the jury that it could only consider the facts supporting the (F)(6) aggravator as *one* aggravating circumstance. (Item *83 410.) Defense

counsel also made clear on several occasions that permitting the State to retry the depravity prong and the jury to separately consider it and the prior jury's findings of cruelty and heinousness would amount to double counting in violation of Double Jeopardy. (See e.g., Item 457.) The trial court, however, from the inception of the retrial during voir dire advised the second jury that "certain aggravating factors have also been determined" by the first jury. (E.g., RT 4/3/06 at 19, RT 4/4/06 at 31, RT 4/5/06 at 15.) Moreover, in preliminary instructions the court advised the jurors over objection that "[i]t has already been determined that the first degree murder was committed in an especially cruel and heinous manner" without defining either term. (RT 4/12/06 at 3-7, 26.) The prosecutor then began his opening remarks by telling the jury:

Additionally, the Court has told you that the defendant - - or there has been *two aggravating factors* that have been found beyond a reasonable doubt as to this individual here, and they are that this murder of which he's been convicted was especially cruel which means that the victim suffered at the time of this killing.

Additionally, you have already been told that the second aggravating factor has bee found, and that is that this murder was especially depraved.

(*Id.* at 40-41) (emphasis added.)

After the second jury found the (F)(5) and (F)(6) depravity prong proven the prosecutor perpetuated and emphasized this clear error by *84 advising the jury in opening remarks: "During the last phase of these proceedings, the existence of *four aggravating factors* has already been proven." (RT 5/9/08 at 30)(emphasis added.)

Appellant specifically objected to the court's final jury instructions and requested that the court instruct the jury that the (F)(6) aggravator could be considered only as one aggravator notwithstanding the fact that between the two juries all 3 prongs had been found to be true. (RT 5/17/06 at 25.)[20] The trial court indicated it was "confused" and "not as smart as the people that do the jury instructions and certainly the appellate court." (Id. at 50.) Thereafter, it denied Appellant's request and instead instructed the jury as follows:

20 Appellant timely moved for a new trial in part due to this violation of his constitutional rights which was denied without argument. (Items 481 & 510.)

As you were previously instructed, it has already been determined that the defendant is guilty of first degree murder. The following aggravating circumstances have been found to exist.

1. The defendant committed the murder in an especially cruel manner.

2. The defendant committed the murder in an especially heinous manner.

3. The defendant committed the murder in an especially depraved manner.

4. The defendant committed the murder in expectation of the receipt of anything of pecuniary value.

(RT 5/18/06 at 4.)

*85 The prosecutor again seized upon the court's error in closing argument to implore the jury to sentence Appellant to death because the *four* aggravating factors proven outweighed the proffered mitigation. The prosecutor argued that "the *three* aggravating factors that have already been proven" were illustrated by gruesome photographs he displayed for effect to the jury. The prosecutor then went on to individually define each (F)(6) prong and three times argue that the "so called mitigating factors" were not substantial to outweigh each aggravator. (Id. at 73-75.)

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As discussed above, the (F)(6) aggravator though worded in the disjunctive is but a single aggravator. To count each prong more than once violates Double Jeopardy as it allows double counting of the same facts that support each prong. *State v. Medina*, 193 Ariz. 504, 512, ¶25, 975 P.2d 94 (1999); *State v. Miles*, 186 Ariz. 10, 19, 918 P.2d 1028 (1996). *See also, State v. Miller*, 186 Ariz. 314, 327, 921 P.2d 1097 (1994) (sentencer may not weigh (F)(6) more than once even if all three prongs are proven.) The trial court's clear error throughout the aggravation and penalty phases of the second trial unconstitutionally tipped the balance in favor of the State by permitting it to argue and the jury to triple count a single aggravating circumstance. The error violated the Fifth and Fourteenth Amendments.

*86 Striking two of the prongs and reweighing the evidence will not cure this error as it is unclear at best whether a properly instructed jury with a lawful argument before it would have also sentenced Appellant to death. Appellant's death sentence cannot stand on such an unconstitutional footing and must now be vacated. See, *Mills v. Maryland*, 486 U.S. 367, 376-77 (1988) ("Unless we can rule out the substantial possibility that the jury may have rested its verdict on the 'improper' ground, we must remand for resentencing."). See also, *State v. Lehr*, 205 Ariz. 107, 109, ¶8, 67 P.3d 703, 705 (2003) (The reversal of even a single aggravating factor means that the "sentencing calculus... has changed."); *State v. Munninger*, 209 Ariz. 473, 485-86, ¶¶41-42, 104 P.3d 193 (App. 2005) ("The reversal of some aggravating factors affects the balance of all the circumstances, aggravating and mitigating, and the balancing process is within the realm of the sentence [r].")

16. The jury instruction that inadequately and inaccurately set forth the jury's mitigation assessment reduced the State's burden of proof and was structural error.

STANDARD OF REVIEW: This Court reviews *de novo* whether the trial court has properly instructed the jury on the law in a capital case. *State v. Glassel*, 211 Ariz. 33, 53, ¶74, 116 P.3d 1193, 1213 (2005). The Court reviews for an abuse of discretion whether the trial court erred in giving or *87 refusing to give a requested jury instruction. *State v. Anderson (Anderson II)*, 210 Ariz. 327, 343,160, 111 P.3d 369, 385 (2005).

Appellant submitted two alternative versions of the Mitigation Assessment and Sentencing Burden of Proof jury instruction patterned after Arizona Capital RAJI 2.5 with a supporting memorandum of law. (Item 410.) In each proposed instruction Appellant sought to make clear for the jury, consistent with ARS § 13-703(E) and this Court's pronouncements in Baldwin that the jurors task was to determine whether "there are no mitigating circumstances sufficient to call for leniency." (Id. at 14-15.) Baldwin, 211 Ariz. at 473, ¶21. Instead the trial court incorrectly placed the burden of proof on the Appellant and instructed the jury as follows:

You individually determine whether mitigation exists. In light of that mitigation and. the aggravating circumstances found, *you must then individually determine if the total of the mitigation is sufficiently substantial to call for leniency."*

(RT 5/18/06 at 13) (emphasis added.)

This instruction improperly set forth Arizona law and thereby improperly placed the burden of proof on Appellant to prove his life should be spared. *See, State v. Tucker*, 215 Ariz. 298, 317, ¶ 76, 160 P.3d 177 (2007). ("We reaffirm our statement in *Baldwin* that jury instructions prospectively should avoid 'outweighing' language and should clearly explain 'that a juror may not vote to impose the death penalty unless he or *88 she finds, in the juror's individual opinion, that 'there are no *mitigating circumstances sufficiently substantial to call for leniency.*'" (emphasis added.) As this case was tried after *Baldwin* this error cannot be considered other than structural since it reduced the State's burden of proof by improperly placing the burden upon Appellant. *Sullivan v. Louisiana*, 508 U.S. 275, 280-82 (1993).

Appellant also requested that the jury be instructed that: "[b]efore you may return a sentence of death, you must unanimously find that death is the only appropriate sentence." (Item 410 at 14-15.) The court rejected this request and instead instructed the jury only that the question to be decided was: "Should the defendant be sentenced to life imprisonment or death for his conviction of first degree murder." (RT 518/06 at 15.)

Appellant's request was an accurate and important statement of Arizona law. ARS § 13-703.01(H); *Anderson II*, 210 Ariz. at 348, ¶86 ("the only issue during the penalty phase is whether death is the appropriate sentence." Arizona law does not create a presumption of death. *Baldwin*, 211 Ariz. at 471, fn3 ("the finding of an aggravating factor simply renders the defendant eligible for the death penalty; it does not require that he receive it.") As the jurors in this case were not at any point accurately *89 whether they unanimously agreed that the defendant should die regardless of the proven aggravation and mitigation they were erroneously presented with instructions that created a "presumption of death." The error was structural since Appellant did not receive the full benefits of his presumption of innocence thereby improperly reduced the State's burden of proof.

Appellant also requested that the court submit a form of verdict that gave the jury the option of checking "Unable to Reach a Verdict" and consistent with Capital RAJI 2.4 instruct the jury as follows:
Each of you must decide the case after you consider for yourselves after you consider the evidence with your fellow jurors. You should not change your honest belief concerning the weight or effect of the evidence because of the opinions of your fellow jurors or for the mere purpose of returning a verdict.

(RT 5/17/06 at 42.) The court rejected it as "already adequately covered" and refused to alter the verdict form. (Id.) The instructions as given failed to convey to the jurors that they were not required to reach a verdict and therefore amounted to an incorrect statement of Arizona law. See, ARS § 13-703.01(K), (L) ("If the new jury is unable to reach a unanimous verdict, the court shall impose a sentence of life or natural life on the defendant." *Cf., State v. Martinez*, Ariz.__,¶40,__3d (2008). The absence of this aspect of Arizona law had the impermissible effect of coercing a verdict of death and thereby depriving Appellant of his rights under the Sixth *90 Amendment. *See, State v. Dunlap*, 187 Ariz. 441, 464, 930 P.2d 518 (App. 1996),

17. Appellant was deprived of his right to due process as a result of the cumulative affect of the State's prosecutorial misconduct.

STANDARD OF REVIEW: In reviewing a claim of prosecutorial misconduct this Court focuses on whether it affected the proceedings in such a way as to deny the defendant a fair trial. *State v. Hughes*, 193 Ariz. 72, 80, ¶31, 969 P.2d 1184 (1998). Claims of prosecutorial misconduct are reviewed for their cumulative effect upon the jury. *Id.* at ¶¶ 26-30. The Court analyzes unobjected to misconduct for fundamental error and objected to misconduct as trial error. *State v. Roque*, 213 Ariz. 193, 228,154, 141 P.3d 368 (2006).

An appellate court will reverse a conviction due to prosecutorial misconduct if two conditions are satisfied: 1) misconduct is in fact present; and 2) a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying defendant a fair trial. *State v. Atwood*, 171 Ariz. 576, 606., 832 P.2d 593 (1992). Reversible error occurs when the prosecution's remarks at trial involve matters that the jury would not be justified in considering when arriving at a verdict and, under the circumstances, the jury was probably influenced by the remarks. *State v. Gonzales*, 105 Ariz. 434, 437, 466 P.2d 88, 91 (1970).

*91 "[P]rosecutors' duties exceed those of lawyer's generally." *In re Zawada*, 208 Ariz. 232, 236, 92 P.3d 862 (2004). "A prosecutor is not simply another lawyer who happens to represent the state. Because of the overwhelming power vested in his office, his obligation to play fair is every bit as compelling as his responsibility to protect the public." *Id.* at 239. In evaluating a claim of misconduct it is important to consider the experience of the particular prosecutor as an experienced litigator has a "greater appreciation of the advantages" of resorting to misconduct. *In re Peasely*, 208 Ariz. 27, 36-37, 90 P.3d 764 (2004). In this case the prosecutor was a seasoned capital lawyer with well over 20 years of experience. As established herein, the prosecutor's pervasive intentional misconduct deprived Appellant of a fair trial.

A. Objected to misconduct pervaded Appellant's trials.

Although the trial court had ruled that the State was precluded from telling the jury in opening remarks of the second trial that Appellant had committed premeditated or intentional murder (RT 4/12/06 at 12-24) the State repeatedly violated that ruling by calling Lynch "the murderer." Appellant objected and moved for a mistrial. The trial court denied the motion and indicated the State was "right on the edge" of a "fine line." (Id. at 40-42.) Notwithstanding the trial court's ruling, the State committed *92 misconduct by violating the trial court's pretrial order and presenting inflammatory remarks unsupported by the record. See, State v. Comer, 165 Ariz. 413, 426, 799 P.2d 333,346 (1990).

Also during opening remarks in the second trial the prosecutor indicated that DNA expert Steve Clemens would testify that the knife found in the room used by Sehwani was "not consistent with that being the murder weapon." The prosecutor elaborated, over Appellant's objections that "unless there's some sort of science out there that hasn't been invented yet, this is not involved because it's not consistent with the stabbing." (RT 4/12/06 at 75.) Appellant objected and moved for a mistrial because these statements were not only argument but improperly misleading the jury since the prosecutor knew from the testimony at the first trial that Clemens could not testify that the weapon was not the murder weapon, only that in his opinion no DNA was found on the blade. The court denied the motion and indicated that it would revisit the issue if the prosecutor "puts something on in an opening statement that is not supported by evidence during the course of the trial." (Id. at 76-79.)

The evidence did not support this argument as Clemens could not testify that the weapon found in the room was not the murder weapon, only that his DNA testing results indicated that "either they did such a really good *93 job of wiping it off or it wasn't used possibly" and would under the latter scenario be inconsistent with it being "in somebody's neck." (RT 4/20/06 at 97.)

"The prosecutor's opening statement should be an objective summary of the evidence reasonably expected to be produced, and the prosecutor should not use the opening statement as an opportunity to 'poison the jury's mind against the defendant' or 'to recite items of highly questionable evidence.'" *United States v. Brockington*, 849 F.2d 872, 875 (4th Cir. 1988). *See also, State v. Lee*, 110 Ariz. 357, 360, 519 P.2d 56, 59 (1974) ("The object of an opening statement is to apprise the jury of what the party expect to prove and prepare the jurors' minds for the evidence which is to be heard.")

Appellate courts have found it to be "severe misconduct" when the government indicates it will present certain evidence during trial that it fails to later produce. *United States v. Williams-Davis*, 90 F.3d 490, 507 (D.C. Cir. 1996). See also, *State v. Bracy*, 145 Ariz. 520, 525-26, 703 P.2d 520 (1985) (prosecutor's opening statement that a witness had made a positive identification of the defendant was "baseless and improper" when the trial court had not yet ruled the pretrial identification admissible and ultimately ruled it inadmissible.)

*94 As the trial court surmised, the prosecutor's opening remarks that poisoned the jury on this issue were baseless and unsupported by the evidence. The court erred by failing to declare a mistrial.

During the penalty phase of the second trial Appellant presented the testimony of Cheryl Karp, PhD, as a teaching witness. Appellant made clear that Dr. Karp had not examined or tested him and would testify only regarding the established research on childhood abuse and later violence. On cross examination the State sought to impeach Dr. Karp based upon whether she gave a diagnosis in a civil case without examining the witness and underlying materials. The court sustained Appellant's objections to that line of questioning. The prosecutor then questioned Dr. Karp over repeated objections regarding her alleged misuse of the results of an MMPI II in an unrelated case. (RT 5/15/06 at 76-86.) The prosecutor then unsuccessfully attempted to admit into evidence an e mail by defense counsel to Dr. Karp's assistant regarding her work on the case. (Id. at 86-92.) The court later denied Appellant's motion for a mistrial based upon this line of questioning which further impugned the expert's and counsel's integrity. (Id. at 93.)

During closing arguments the prosecutor attacked Dr. Karp's integrity by arguing that she was a "charlatan" that would say anything for a fee. The State further argued she conducted no testing on Appellant because she and *95 defense counsel knew that the results would be unfavorable. The prosecutor went as far as to suggest that counsel and Dr. Karp were hiding unfavorable testing results and that defense counsel had purposefully set up the expert's testimony to hide this unfavorable

information by giving her "marching orders" in the e mail that the court refused to admit into evidence. (RT 5/18/06 at 31-37, 40.) Appellant moved for a mistrial which the court denied. *(Id.)*

"A prosecutor has wide latitude in presenting arguments to the jury." *State v. Morris*, 215 Ariz. 430, ¶58, 160 P.3d 203, 216 (2007). However it is improper to "imply unethical conduct on the part of an expert witness" in the absence of evidentiary support. *State v. Velasquez*, 216 Ariz. 300, ¶ 48, 166 P.3d 91 (2007) (quoting *Hughes*, 193 Ariz. at 86, ¶ 86.) In a similar vein, it is misconduct to impugn the integrity or honesty of opposing counsel. *State v. Newell*, 212 Ariz. 389, ¶ 66, 132 Ariz. 833 (2006).

In this case the prosecutor committed misconduct that should have led to a mistrial on several occasions by improperly attacking the honesty and ethics of both defense counsel and Dr. Karp without sufficient evidentiary support. *Velasquez* at ¶ 49. He also committed misconduct by vouching since his argument implied that he had information from outside the record that supported the State's expert's opinion that the reason Appellant was not *96 psychologically tested was that the results were unfavorable and somehow presenting Dr. Karp as an educational witness was improper and unethical. (See, RT 5/16/06 at 27-36.) State v. King, 180 Ariz. 268, 277, 883 P.2d 1033 (1994) (Prosecutorial vouching occurs either "(1) where the prosecutor places the prestige of the government behind its witnesses; (2) where the prosecutor suggests information not presented to the jury that supports the witness's testimony.") The trial court abused its discretion in denying Appellant's repeated motions for a mistrial.

During closing argument on the aggravation phase of the second trial the prosecutor quoted from a dictionary his own definitions of the jury instructions elements of "depravity" as follows: 1) "debasement is something akin to lowering in dignity, value, quality or manner;" 2) "corruption [is] departure from what is correct and pure;" 3) "perversion, that just means twisted, sadistic;" 4) Deterioration, to become worse or of no value." (RT 5/4/06 at 42-43.) The parties addressed the issue in chambers off the record and then came into the court room where a record was made ofAppellant's objections to the prosecutor infusing dictionary definitions from outside of the approved instructions. The trial court denied to take any action, such as further instructing the jury, and indicated that it believed the prosecutor's comments were proper argument. (Id. at 50-52.) Contrary to the *97 court's conclusion the prosecutor committed misconduct by improperly referring to evidence outside of the record as well as urging the jury to determine the case on an improper basis based upon his misstatement of how. Arizona law defined the (F)(6) depravity aggravator. *See, State v. Serna*, 163 Ariz. 260, 266, 787 P.2d 1062 (1990) (prosecutor's misstatement of law was improper closing argument.)

B. Unobjected to misconduct also pervaded Appellant's trials.

During opening statement at the first trial the prosecutor indicated emphatically that the evidence the jury would hear would establish the following facts: 1) that Lynch drove the truck he was later arrested near at the Motel 6 (RT 11/7/05 at 42); 2) that "Mr. Panzarella owns a Lexus and they also took that" (Id. at 47); 3) that Lynch took part in arranging the, transaction with Potts (Id. at 55); 4) that the defendants "rendered him helpless" (Id. at 44). None of this promised evidence was presented during the trial. (see, RT 11/8/05 at 30 (Lexus was parked at victim's brother's house); RT 11/9/05 at 16 & 32 (Ramsey confirms that Appellant had nothing at all to do with the transaction); RT 11/17/05 at 67-74 (ME testimony fails to *98 support conclusion that victim "helpless" just restrained or when or how bruising caused other than shortly before death.)

Similarly, during the opening statement in the second trial the prosecutor asserted: 1) that Tracy Ramsey would tell the jury that Lynch was sitting with a knife in front of him on the table controlling the victim (RT 4/12/06 at 49); 2) that Ramsey's testimony would indicate that Lynch was sitting with the victim "being the boss of things" controlling the victim and what was occurring in the home and with the transaction, (Id. at 49-50.) In reality, again, the evidence supported neither assertion but was in opposite. (See, RT 4/13/06 at 65 (knife sitting with other items such as newspaper, candleholder, beer bottle or can, in the middle of the table); *Id.* at 17 (Potts testified no interaction with anyone but Sehwani), Id. at 47-74 (Ramsey testified that Lynch walking around while Panzarella negotiated and paid for contract signed by Sehwani).

In this case the prosecutor committed misconduct since he promised the jury that he would present the foregoing evidence which would prove Appellant's involvement in the murder and none of it was ever presented. In fact, the evidence was diametrically opposed to the prosecutor's assertions which prejudiced Appellant's defense. *See, Brockington, supra. Bracy, supra.*

*99 During the penalty phase of the first trial the prosecutor repeatedly attacked the defense expert Dr. John Curtain, who was an educational witness on substance abuse, by alleging that he had shred various documents in an unrelated prior case and acted unethically. (RT 1/26/06 at 50.) Although defense counsel failed to object the court on a break cautioned the prosecutor to treat the witness with respect and dignity. (Id. at 64-65.) As discussed above, improperly attacking the credibility of an expert without evidentiary support is reprehensible misconduct. *See, Hughes,* 193 Ariz. at 86.

Also during closing arguments at the second trial, without objection, the prosecutor repeatedly implored the jury to "compare" Appellant's submitted mitigation, including the love of his family and friends, with the victim's mother's love for her son. The prosecutor began: "*Compare* that love to that of Rosalie Lynch. I don't mean and that's not my intent to denigrate the love for a child. I don't mean that at all. It is a mitigating circumstance, but *you need to compare it.*" He then argued: "*Compare* those two. Do you really think that this mitigating circumstance is really that powerful? Is it really of a substantial weight when you compare the two of them? Obviously, it isn't." (RT 5/18/06 at 48-50.)

*100 This Court has long recognized that victim impact evidence is irrelevant to any aggravating factors so is therefore generally inadmissible. *State v. Bolton,* 182 Ariz. 290, 315, 896 P.2d 830 (1995). *See also, State v. Williams,* 183 Ariz. 368, 386-87, 904 P.2d 437 (1995)(Feldman, C.J. concurring). Such evidence is admissible for the limited purpose of showing that "the victim is an his individual whose death represents a unique loss to society and in particular to his family." *Payne v. Tennessee,* 501 U.S. 808, 814 (1991). Any relevance to victim impact evidence pales in comparison to the prejudicial effect it has on a jury requested to make a life or death decision. Such evidence is highly emotional and serves no relevant purpose other than to appeal to the sympathies of the jury. *Williams, supra.*

By directly asking the jury to compare the victim's life and his mother's love for her deceased son with Appellant's proffered mitigation the State here improperly appealed to the passions and sympathy of the jury. Such appeals to direct comparisons should be deemed misconduct in this case subject to reversal for fundamental error since it permitted the State to deprive Appellant of a fair sentencing proceeding where the jury could consider and properly give effect to all proffered mitigation rather than reaching a death sentence on an improper emotional basis.

*101 The State also exhibited 4 gruesome photographs for the jury (exhibits 43, 50, 51 & 84) and implored the jurors to "compare" the murder with and "weigh" it against the proffered mitigation. Appellant objected and moved for a mistrial which was again denied. (RT 5/18/06 at 72-74.) This argument was misconduct because it was a misstatement of the law, *see, Baldwin,* 211 Ariz. at 473, and also because it was designed to inflame the jury and convince it to sentence Appellant to death on mere passion and prejudice rather than rational evaluation of the evidence. *See, Serna, supra. See also, State v. Phillips,* 156 P. 3d 583, 587 (Idaho App. 2007) (It is prosecutorial misconduct for a prosecutor to misstate the law in closing argument); *State v. Davenport,* 675 P.2d 1213 (Wa. 1984) (vacating conviction when jury returned guilty verdict based upon prosecutor's misstatement regarding accomplice liability.)

When reviewed cumulatively in the course of both trials it becomes obvious that the misconduct in this case was pervasive and deprived Appellant of a fair trial which should now be granted by this Court.

18. This Court should vacate Lynch's death sentence upon independent review.

STANDARD OF REVIEW: Since the offenses in this case occurred March 25, 2001 this Court must independently review the aggravating and mitigating circumstances and the propriety of the death sentence. *State v.* *102 *Andriano,* 215 Ariz. 497, ¶63, 161 P.3d 540 (2007). In conducting this review the Court does not simply consider the quantity of factors proven but looks at the quality and strength of those factors. *State v. Greene,* 192 Ariz. 431, 443, ¶ 60, 967 P.2d 106, 118 (1998). The Court does

"not defer to the findings or decision of the jury' with respect to aggravation or mitigation, when "determining the propriety of the death sentence.'" *State v. Newell*, 212 Ariz. 389, 405, ¶82, 132 P.3d 833, 859 (2006) (quoting *State v. Roseberry*, 210 Ariz. 360, 374, ¶77, 111 P.3d 402, 416 (2005)). "When there is a doubt whether the death sentence should be imposed, [the Court] will resolve that doubt in favor of a life sentence." *State v. Carlson*, 202 Ariz. 570, 588, ¶70, 48 P.3d 1180 (2002); *State v. Valencia*, 132 Ariz. 248, 250, 645 P.2d 239, 241 (1982).

Appellant initially urges this Court to expressly hold that in cases subject to independent review the Court will consider all of the evidence presented, irrespective of its admissibility under the rules of evidence, whether at the retrial or initial guilt and sentencing trial. For if this Court does not so expansively review the entire record, how can this Court complete the task mandated by the Eighth Amendment that it has described as follows:

> *103 The question before us is not whether the trial court properly imposed the death penalty, but whether, based upon the record before us, we believe that the death penalty should be imposed. A finding merely that the imposition of the death penalty by the trial court was "factually supported" or "justified by the evidence" is not the separate and independent judgment by this court that the death penalty warrants. This is in keeping with the mandate of the United States Supreme Court that we must review carefully and with consistency death penalty cases and not engage in a "cursory" or "rubber stamp" type of review. *Proffitt v. Florida*, 428 U.S. 242 (1976).

State v. Watson (Watson III), 129 Ariz. 60, 63, 628 P.2d 942 (1981).

This Court's observations in *Watson* are no less applicable to this post jury death sentence independent review which after careful consideration should lead to a sentence of life.

A. The evidence regarding the State's alleged aggravating circumstances and *Enmund/Tison* predicate is subject to doubt and if upheld should be given minimal weight.

Appellant has already briefed above his position that the evidence was insufficient to prove that he is qualified for the death penalty under *Enmund/Tison* or any aggravating circumstance. (Issues 9 and 10.) In the sake of brevity, the arguments will not be repeated here other than to submit that if this Court finds there was sufficient evidence to qualify Shawn for the death penalty it should be given minimal weight since the evidence is contradictory and inconclusive.

***104 B. Appellant's proven mitigation is sufficiently substantial to warrant a life sentence.**

This Court has repeatedly indicated that greater weight will be given to mitigation evidence where there is a causal nexus established between the mitigation and the murder. *See e.g., State v. Pandeli IV*, 215 Ariz. 514, ¶ 72 (citing *State v. Newell*, 212 Ariz. 389, 405, ¶82, 132 P.3d 833, 849 (2006). Recently, the Ninth Circuit held that placing such a limitation on consideration of mitigation violates the Eighth Amendment and this Court's duty to independently review a death sentence and reweigh aggravation and mitigation under *Clemons v. Mississippi*, 494 U.S. 738, 748-749(1990). *Styers v. Schiro*,__ F.3d__(Case No.07-99003)(2008)(Slip Op.at 14873 quoting *Smith v. Texas*, 543 U.S.37,45 (2004)("we never countenanced and now have unequivocally rejected [a nexus test]. Appellant requests in light of this clear federal authority to the contrary that this Court abandon its nexus requirement and consider without limitation the following proven mitigation.

1. Appellant has low intelligence functioning.

The early psychological testing related to Appellant's competency to stand trial indicated that he had an IQ of "around 80." (E.g., Item 164.) Such marginal intelligence, while not sufficient to forbid the death penalty under *Atkins v. Virginia*, 536 U.S. 304

(2002), "constitutes relevant mitigation *105 evidence." *See, Wiggins v. Smith,* 539 U.S. 510, 535 (2003) (defendant's IQ was 79).

2. Appellant suffers from PTSD and Paranoid and Delusional Personality Disorders.

The examining mental health professionals all agreed that Appellant suffers from a long standing traumatic stress disorder, and paranoid personality disorder with delusions. These disorders and conditions existed at the time of the murder at a time when Appellant was not receiving treatment or medication. (Items 164 & 203.) Donna Phillips confirmed that he continued to suffer the traumatic effects and guilt for the death of her father, who died in a car accident while Shawn was driving, which is further evidence of PTSD. (RT 5/16/06 at 4-15.) These disorders which existed at the time of the crimes and throughout his two trials and should be considered as nonstatutory mitigation. *See, State v. McMurtrey,* 136 Ariz. 93, 102, 664 P.2d 637 (1983).

3. Appellant came from a dysfunctional family that led to his own drug abuse and dysfunction.

During both trials the jury heard from Appellant's sister, mother (now deceased) and brother about his upbringing in a home where his parents were violent and abusive alcoholics that physically abused Appellant and his brothers. (RT 1/24/06 at 15-32, exhibit 423 & 455.) Appellant's brothers and *106 he all grew up to be drug abusers. His younger brother committed suicide following a battle with crack addiction. His other brother, like Shawn, wound up in prison. *(Id.)* Such dysfunctional upbringing is entitled to weight in mitigation. *State v. Doerr,* 193 Ariz. 56, ¶ 64, 969 P.2d 1168 (1998).

Appellant also grew up to be a daily drug abuser (RT 5/15/06 at 26-31) and there is some evidence that he, like the victim and his codefendant, was under the influence of crack cocaine at the time of the crime. (RT 11/17/05 at 20, RT 11/10/05 at 98-99.) This drug abuse and use around the time of the murder is entitled to weight in mitigation. *See, State v. Jones,* 185 Ariz. 471, 491, 917 P.2d 200 (1996).

4. Appellant served his country in the Marines.

Appellant presented evidence that he spent four years in the Marines. (RT 5/16/06 at 4-20.) Although he received a less than honorable discharge (for being AWOL and using marijuana) such service is entitled to weight in mitigation. *See, State v. Lavers,* 168 Ariz. 376, 396. 814 P.2d 333 (1991).

5. Appellant is a skilled artist.

Appellant also presented uncontroverted evidence that he is a skilled restoration artist. (Exhibit 423, RT 5/15/06 at 4-15.) This talent is entitled to weight in mitigation. *See, State v. Roscoe,* 184 Ariz. 484, 501, 910 P.2d 635 (1996).

***107 6. Appellant has family love and support and his execution will impact his family.**

Appellant presented uncontroverted testimony that those family members that remain (his father, mother and brother are now deceased) will all be gravely impacted from his execution. Appellant also proved that his family members love and support him and that he communicates regularly with them and provides similar love and support. (Exhibits 423, RT 5/15/06 at 4-31.) This evidence deserves weight in mitigation. *See, State v. Gonzales,* 182 Ariz. 502, 515, 892 P.2d 838, 851 (1995).

7. Appellant was convicted of felony murder and there is a reasonable doubt as to whether he killed the victim.

As fully briefed throughout this Opening Brief (see particularly supra at 10-17), the evidence is, as the first jury concluded, highly speculative as to whether Appellant actually killed the victim. The State's entire case on this issue depended upon the

jury believing that the blood on Shawn's shoes indicated that he was standing behind the victim and inflicted the fatal blow. Such evidence is insufficient to rest a death sentence upon especially in light of the first jury's rejection of all *Enmund* factors, the first jury's rejection of premeditated murder, the evidence indicating that the codefendant destroyed all evidence pertaining to his involvement (for example, his shoes, clothing and the blood stained knife from the bedroom) other than his use of the *108 victim's credit cards and property following the murder, and the second jury's consideration of less than the complete evidence. Both doubt as to whether Shawn was the killer and his felony murder conviction are entitled to substantial weight in mitigation. *See, State v. Canez (Canez I)*, 202 Ariz. 133, 163-64, ¶117 42 P.3d 564 (2002).

8. Appellant's death sentence is disproportionate to his codefendant's life sentence.

An unexplained disparity in sentences of a defendant and accomplice is a recognized and often powerful mitigating circumstance. *State v. Mann*, 188 Ariz. 220, 230, 934 P.2d 784, 794 (1997). "[D]isparity between the sentences of accomplices ... *must be considered* and may be found as a mitigating circumstance and weighed against any aggravating circumstances, in determining whether to impose the death penalty." *State v. Marlow*, 163 Ariz. 65, 72, 786 P.2d 395, 402 (1989).

Following Appellant's conviction and death sentence the State permitted Sehwani to plead guilty to felony murder and stipulated that he receive a sentence of life without parole. For purposes of his guilty plea Sehwani placed the responsibility for the victim's death upon Shawn Lynch. (RT 4/11/08 at 11.) This does not end the inquiry. For as discussed immediately above (and also under Issue 9) no fact finder has ever determined beyond a reasonable doubt that Shawn was the person that killed *109 the victim. The only difference here between Sehwani and Appellant is that Sehwani was perhaps more astute and intelligent by destroying the evidence that proved that it was he who killed the victim. The record remains, however, incomplete of evidence proving beyond a doubt that Shawn killed the victim. This makes the disparity in this case unexplained and subject to considerable weight in mitigation.

This Court should upon independent review reduce Shawn Lynch's sentence to life.

CONSTITUTIONAL CHALLENGES TO THE DEATH SENTENCE RAISED AND PRESERVED FOR FUTURE FEDERAL REVIEW.

Appellant preserves and does not waive the following constitutional challenges to his death sentences. This Court has rejected such challenges in the past, but the law is a fluid and living thing. Appellant is confident that this Court or the Supreme Court will determine the error of having rejected these claims. When that day comes, Appellant will have raised and preserved them for review in the Federal Courts. Appellant raises and "fairly presents" these claims to this Court in the first instance and invites this Court again and affords this Court the opportunity to correct its earlier jurisprudence. Conscious of the constraints imposed on lengths of briefs (*State v. Atwood*, 171 Ariz. 576, 658, 656 832 P.2d 593 (1992) and *State v. Cruz*, 175 Ariz. 395, 401, 857 P.2d 1249 (1993)), Appellant presents these *110 claims in an itemized way followed by the authority that rejected the claim, not in derogation of their importance, but in deference to economy and efficiency.

1. The death penalty is *per se* cruel and unusual punishment. *Gregg v. Georgia*, 428 U.S. 153, 186-87 (1976); *State v. Salazar*, 173 Ariz. 399, 411, 844 P.2d 566, 578 (1992).

2. Execution by lethal injection is *per se* cruel and unusual punishment. *State v. Hinchey*, 181 Ariz. 307, 315, 890 P.2d 602, 610 (1995).

3. The statute unconstitutionally requires imposition of the death penalty whenever at least one aggravating circumstance and no mitigating circumstances exist. *Walton v. Arizona*, 497 U.S. 639, 648 (1990); *State v. Miles*, 186 Ariz. 10, 19, 918 P.2d 1028, 1037 (1996);

4. The death penalty is unconstitutional because it permits jurors unfettered discretion to impose death without adequate guidelines to weigh and consider appropriate factors and fails to provide principled means to distinguish between those who deserve to die or live. *State v. Johnson*, 212 Ariz. 425, 440, ¶69, 133 P.3d 735, 750 (2006).

5. Arizona's death statute unconstitutionally requires defendants to prove that their lives should be spared. *State v. Fulminante*, 161 Ariz. 237, 258, 778 P.2d 602, 623 (1988).

*111 6. The statute unconstitutionally fails to require the cumulative consideration of multiple mitigating factors or require that the jury make specific findings as to each mitigating factor. *State v. Gulbrandson*, 184 Ariz. 46, 69, 906 P.2d 579, 602 (1995).

7. Arizona's statutory scheme for considering mitigating evidence is unconstitutional because it limits full consideration of that evidence. *State v. Mata*, 125 Ariz. 233, 242, 609 P.2d 48, 57 (1980).

8. The statute is unconstitutional because there are no statutory standards for weighing. *Statev. Atwood*, 171 Ariz. 576, 645-46 n. 21(4), 832 P.2d 593, 662-63 n. 21(4) (1992).

9. Arizona's death statute insufficiently channels the sentencer's discretion in imposing the death sentence. *State v. Greenway*, 170 Ariz. 151 ,164, 823 P.2d 22, 31 (1991).

10. The prosecutor's discretion to seek the death penalty unconstitutionally lacks standards. *State v. Cromwell*, 211 Ariz. 181,192, ¶58,119 P.3d 448, 459 (2005).

11. Death sentences in Arizona have been applied arbitrarily and irrationally and in a discriminatory manner against impoverished males whose victims have been Caucasian. *State v. West*, 176 Ariz. 432, 455, 862 P.2d 192, 215 (1993).

*112 12. The Constitution requires a proportionality review of a defendant's death sentence. *State v. Gulbrandson*, 184 Ariz. 46, 73, 906 P.2d 579, 606 (1995).

13. Subjecting Appellant to a second trial on the issue of aggravation and punishment before a new jury violates the double jeopardy clause of the Fifth Amendment. *State v. Ring (Ring III)*, 204 Ariz. 534, 550,¶ 39, 65 P.3d 915 (2003).

.14. Appellant's death sentence is in violation of his rights to a jury trial, notice and due process the Fifth, Sixth and Fourteenth Amendments since he was not indicted for a capital crime. *McKaney v. Foreman*, 209 Ariz. 268, 271, ¶13, 100 P.3d 18, 21 (2004).

15. Imposition of a death sentence under a statute not in effect at the time of Appellant's trial violates due process under the Fourteenth Amendment. *State v. Ellison*, 213 Ariz. 116,¶85, 140 P.3d 899 (2006.)

16. The reasonable doubt jury instruction at the aggravation trial lowered the state's burden of proof and deprived Appellant of his right to a jury trial and due process under the Sixth and Fourteenth Amendments. *State v. Dann I)*. 205 Ariz. 557, 575-76, ¶ 74, 74 P.3d 231 (2003).

17. Arizona's death statute creates an unconstitutional presumption of death and places an unconstitutional burden on Appellant to prove mitigation is *113 " substantial to call for leniency." *State v. Glassel*, 211 Ariz. 33, 52,¶72, 116 P.3d 1193, 1212 (2005).

18. The failure to provide the jury with a special verdict on Appellant's proffered mitigation deprived him of his rights to not be subject to ex post facto legislation and right to meaningful appellate review. *State v. Roseberry*, 210 Ariz. 360, 373, ¶ 74 & n.12, 111 P.3d 402 (2005).

19. The trial court improperly omitted penalty phase instructions that the jury could consider mercy or sympathy in evaluating the mitigation evidence and determining whether to sentence the defendant to death. *State v. Carreon*, 210 Ariz. 54, 70-71, ¶¶81-87, 107 P.3d 900, 916-17 (2005).

20. Arizona's *current* protocols and procedures for execution by lethal injection constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. *State v. Andriano*, 215 Ariz. 497, ¶¶61-62, 161 P.3d 540 (2007).

21. The jury instruction that required the jury to unanimously determine that the mitigating circumstances were "sufficiently substantial to call for leniency" violated the Eighth Amendment. *State v. Ellison*, 213 Ariz. 116, ¶¶101-102, 140 P.3d 899 (2006).

22. The refusal to permit voir dire of prospective jurors regarding their views on specific aggravating and mitigating circumstnaces violates Appellant's *114 rights under the Sixth and Fourteenth Amendments. *State v. Johnson*, 212 Ariz. 425, 440, ¶¶ 29-35, 133 P.3d 735, 750 (2006).

23. The refusal to permit Appellant to argue or the jury to consider whether his death sentence would be proportional to other similarly situated defendants violated his rights under the Eighth and Fourteenth Amendments. *State v. Johnson*, 212 Ariz. 425, 431-32, ¶¶ 19-20, 133 P.3d 735, 750 (2006).

24. Refusing to instruct the jury or permit the introduction of evidence and argument regarding residual doubt violated Appellant's rights under the Sixth, Eighth and Fourteenth Amendments and Arizona law. *State v. Harrod (Harrod III)*, 218 Ariz. 268, ¶¶37-39 183 P.3d 519 (2008); *State v. Garza*, 216 Ariz. 56, 70, ¶67, 163 P.3d 1006 (2007).

25. The refusal to permit evidence regarding a sentence of life without parole and ineligibility of any future release deprived Appellant of his rights under the Eighth and Fourteenth Amendments. *State v. Cruz*, 218 Ariz. 149, 154-55, ¶¶ 40-45, 181 P.3d 196 (2008).

26. Subjecting Appellant to sentencing before a jury that did not decide his guilt deprives him of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments since his guilt trial jury was organized to convict and his sentencing jury was organized solely to impose a death sentence. *State v. Bocharski (Bocharski II)*, _Ariz.__,¶¶ 17-25,__P.3d__(2008).

*115 27. The failure to instruct the jury that the State bore the burden of proving its rebuttal to mitigation evidence beyond a reasonable doubt violated Appellant's rights under the Sixth, Eight and Fourteenth Amendments. *State v. Roque*, 213 Ariz. 193, 225-26, ¶¶138-140, 141 P.3d 368 (2006).

CONCLUSION

Based upon the foregoing constitutional, evidentiary and statutory errors and violations it is respectfully requested that the Court vacate Shawn Patrick Lynch's convictions and sentences and grant him a new trial.

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APPENDIX – N –

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THECOUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, v. **SHAWN PATRICK LYNCH,** Defendant.	**No. CR 2001-092032-001DT** **DEFENDANT'S WAIVER OF RIGHT TO BE CONSIDERED FOR RELEASE-ELIGIBLE SENTENCE AND MOTION FOR JURY INSTRUCTION REGARDING RELEASE INELIGIBILITY (SIMMONS INSTRUCTION)** **(HONORABLE KAREN O'CONNOR)**

Shawn Patrick Lynch, Defendant, hereby waives his statutory right to be considered for a release-eligible sentence pursuant to A.R.S. §§ 13-751 and 13-752(Q) should the jury return a verdict of life and moves the Court to instruct the jury regarding his release ineligibility pursuant to *Simmons v. South Carolina*, 512 U.S. 154 (1994). Failure to accept Defendant's waiver and/or to instruct the jury as requested will violate Defendant's constitutional rights to due process, equal protection, counsel, a fair trial and appeal, and freedom from cruel and unusual punishment under the 5th, 6th, 8th and 14th Amendments to the United States Constitution and corresponding provisions of the Arizona Constitution.

Defendant's waiver and motion for jury instruction are supported by the attached memorandum of points and authorities and the Court's file.

MEMORANDUM OF POINTS AND AUTHORITIES

A.R.S. §§ 13-751 and 13-752(Q) provide that a criminal defendant who is convicted of first degree murder and not sentenced to death may be considered for one of two sentences: (1) life with eligibility for release after 25 years or (2) natural life with no release whatsoever. Defendant waives his statutory right to be considered for the life sentence and requests that the Court give the instruction attached hereto as Exhibit 1 informing the jury that if they return a verdict for life, Defendant will be sentenced to natural life and will never be released to the community.

I. Defendant Can Waive His Statutory Right To Be Considered For A Release-Eligible Sentence If The Jury Returns A Life Verdict As Long As The Waiver Is Knowing, Intelligent, And Voluntary.

A criminal defendant is free to waive a constitutional or statutory right as long as the waiver is knowing, intelligent, and voluntary and the constitutional provision or statute creating the right neither requires that the state consent nor grants the state the right to object. The United States Supreme Court has long held that a constitutional provision or statute creating a right need not expressly provide for waiver of that right; instead, the presumption is that waiver is available unless expressly precluded or limited by the constitutional provision or statute. *New York v. Hill*, 528 U.S. 110, 114-17 (2000);

United States v. Mezzanatto, 513 U.S. 196, 200-201 (1995); *Peretz v. United States*, 501 U.S. 923 (1991) (stating that '[t]he most basic rights of criminal defendants are subject to waiver'" and listing examples of rights that a criminal defendant may waive); *Shutte v. Thompson*, 15 Wall. 151, 159 (1873) (stating that "[a] party may waive any provision of a statute intended for his benefit"). Absent an express limitation on waiver in the constitutional provision or statute creating the right, the only requirement imposed by the United States Supreme Court is that the waiver be knowing, intelligent, and voluntary. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 237-42 ((discussing standards for waiver of numerous constitutional rights); *see also Bradshaw v. Stumpf*, 545 U.S. 175, 125 S.Ct. 2398, 2403 (2005) (describing standard for waiver of multiple rights through guilty plea); *Michigan v. Harvey*, 494 U.S. 344, 353-54 (1990) (discussing "traditional standards" for determining if defendant waived right to counsel).

Arizona and Ninth Circuit decisions reflect the same presumption of availability of waiver. For example, in *State v. Scott*, 105 Ariz. 109, 111-12, 460 P.2d 3, 5-6 (1969), the Arizona Supreme Court presumed that the defendant could waive his statutory right to a waiting period between the return of a verdict of guilt and sentencing; the only issue was whether the waiver in that case was valid. In a similar vein, the Ninth Circuit has noted that voluntary waivers of certain rights are regularly enforced and that "'[t]he sole test of a waiver's validity is whether it was made knowingly and voluntarily.'" *United States v. Gordon*, 393 F.3d 1044, 1050 (9th Cir. 2004). An exhaustive search of case law indicates that these courts have allowed the State to oppose a criminal defendant's waiver of a constitutional or statutory right only when the enabling constitutional provision or statute

requires that the State consent to the waiver. *E.g.*, *State ex rel. Romley v. Superior Court*, 168 Ariz. 167, 168-69, 812 P.2d 985, 986-87 (1991) (finding defendant cannot unilaterally waive right to preliminary hearing where rule of criminal procedure governing hearings requires state to consent to waiver); *United States v. Cochran*, 770 F.2d 850, 851 (9th Cir. 1985) (holding that defendant cannot waive right to jury trial where rule of criminal procedure governing jury trials requires government to consent to waiver).

Viewed in a related but analytically different framework than presumption-of-waivability, the state lacks standing to object to the waiver of the right to be considered for a particular sentence absent an express provision requiring the state's consent to the waiver. The standing doctrine requires that a party asserting a claim have a cognizable injury capable of redress by the requested relief. *See Adarand Constr. v. Pena*, 515 U.S. 200, 210-11 (1995). The person must have suffered "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.*; *see also County of Riverside v. McLaughlin*, 500 U.S. 44, 51 (1991) (discussing standing in context of civil litigation); *County Court v. Allen*, 442 U.S. 140, 154-55 (1979) (discussing standing in context of challenge to constitutionality of statute). In a capital case, the state has no legal interest that would be injured if the defendant elects to subject himself only to the most severe sentence available short of death in the event that the state does not prevail and the jury returns a life verdict. The very act of seeking the death penalty signals that the state does not believe that a release-eligible sentence is appropriate. Indeed, if the state believed that

the defendant ought to be eligible for release, the state could not ethically pursue the death penalty.

The New Jersey Supreme Court's analysis of an analogous situation in *State v. Fortin*, 843 A.2d 974, 1010-15 (N.J. 2004), is instructive, whether waiver is analyzed within a presumption-of-waivability or a standing framework. In that case, the sentencing scheme in place at the time of the murder provided for a 30-year-to-life sentence if the jury did not return a death verdict. *Id.* at 1010-11. By the time of sentencing, the legislature had amended the statute to provide for life without the possibility of parole and had eliminated the parole-eligible sentence. *Id.* at 1010. Reasoning that jurors would be more likely to return a life verdict if they knew that the defendant would never be released to the community, the defendant decided to subject himself to the more severe sentence provided by the amended statute and requested an instruction reflecting the new statute. *Id.* at 1010-11. In electing to be sentenced under the new statute, the defendant impliedly waived any right to be considered for a parole-eligible sentence. In order to subject himself to the new sentencing scheme, the defendant was required to waiver the *Ex Post Facto* Clause. *Id.* at 1011. The state declined to consent to the waiver and the trial court refused to accept it based on concerns that either an appellate court or the Department of Corrections would not recognize the waiver of the *Ex Post Facto Clause* as valid and would potentially release the defendant after 30 years. *Id.* at 1011.

On appeal, the New Jersey Supreme Court reversed and remanded for resentencing. *Id.* at 1015. In reaching its decision, the court addressed several issues: (1)

whether the legislature intended the new sentencing scheme to apply to cases reaching the penalty phase after the statute was enacted, regardless of the date of the murder (it did); (2) whether the defendant could waive the constitutional right against *ex post facto* imposition of a sentence without the consent of the state or the court (he could); and (3) whether the trial court abused its discretion with respect to the procedures it used in determining whether to accept the waiver (it did). *Id.* at 1012-15. Importantly, the court did not analyze whether the defendant could effectively waive his right to be considered for the parole-eligible sentence or whether the state could object to that waiver. *See id.* Its characterization that the defendant was "denied the benefit of the new statute," *id.* at 1011, presumed that the defendant could waive his right to be considered for a parole-eligible sentence and instead opt to be subject solely to a more severe non-parole-eligible sentence, that the state did not need to agree to the waiver, and that the court could inquire only as to whether the waiver was knowing, intelligent, and voluntary. *See id.* at 1012-15.

The result in this case should be the same as that reached by the New Jersey Supreme Court: Mr. Lynch may waive his right to be considered for a release-eligible sentence and that is his desire. The scope of the statute and *ex post facto* concerns are not at issue here as they were in New Jersey as a "natural life" sentence was available at the time of the murder for which he faces sentencing. Arizona's statutes and rules of criminal procedure governing sentencing, either generally or in capital cases, do not grant the state standing to object to a defendant's waiver of any part of those statutes or rules except those providing for a jury finding of aggravation and penalty in capital cases. *See*

A.R.S. §§ 13-701, 13-703, 13-752; Ariz. R. Crim. P 18.1(b), 26. As such, Mr. Lynch is presumed to be able to waive his right to be considered for a release-eligible sentence if the jury returns a life verdict and the state lacks standing to object to the waiver. The only inquiry is whether Mr. Lynch makes the waiver knowingly, intelligently, and voluntarily. Accordingly, this court should conduct the necessary inquiry and accept the waiver if it is knowing, intelligent, and voluntary.

II. Defendant Is Entitled To An Instruction Informing The Jury About His Release Ineligibility.

Mr. Lynch's counsel are aware that the State has previously filed a Motion to Preclude Testimony Concerning Availability of Parole on September 22, 2005 and the motion was granted by the previous trial judge on October 18, 2005. This prior ruling is not dispositive of Mr. Lynch's request to waive the life sentence option as a penalty for first degree murder. In waiving the life sentence option Mr. Lynch is requesting that the newly empanelled jury be instructed as to the remaining sentencing options for a conviction of murder in the first degree – death or natural life. A party is entitled to an instruction on any theory of the case reasonably supported by the evidence. *State v. Shumway*, 137 Ariz. 585, 672 P.2d 979 (1983), *State v. Axley*, 132 Ariz. 383, 392, 646 P.2d 268, 277 (1982). In light of Mr. Lynch's waiver of the life sentence option, he has the right to have the jury instructed only as to the two remaining sentences – death or natural life.

Attached to this motion is an instruction Mr. Lynch is requesting be incorporated into the preliminary instructions read to the jury before the attorneys give their opening statements.

III. Conclusion.

Mr. Lynch is entitled to waive, and hereby waives, his statutory right to be considered for a release-eligible sentence, regardless whether the State concurs with the waiver. All that remains is for this court to determine that the waiver is knowing, intelligent, and voluntary. To ensure that the jurors are not misled into believing that Mr. Lynch is release-eligible this court must instruct the jury that if they return a life verdict, Mr. Lynch will be sentenced to a "natural life" sentence that does not allow for release on any terms.

EXHIBIT 1

Mr. Lynch requests the following instruction be incorporated into the general preliminary instructions given to the jury at the beginning of his trial:

If you unanimously find that Mr. Lynch should be sentenced to life imprisonment, your foreperson shall sign the verdict form indicating your decision. If you unanimously find that Mr. Lynch should be sentenced to death, your foreperson shall sign the verdict form indicating your decision. If you cannot

unanimously agree on the appropriate sentence, your foreperson shall tell the judge.

Your decision is not a recommendation. Your decision will be binding. If your verdict is that Mr. Lynch should be sentenced to death, he will be sentenced to death. If your verdict is that Mr. Lynch should be sentenced to life he will not be sentenced to death and the court will sentence him to natural life which means Mr. Lynch would never be released from prison for his entire life.

Source: RAJI 1.1 for capital cases, approved by State Bar Board of Governors May 20, 2005, modified as indicated; A.R.S. §13-752 (A); *Kelly v. South Carolina*, 534 U.S. 246 (2002); *Simmons v. South Carolina*, 512 U.S. 154 (1994); *Skipper v. South Carolina*, 476 U.s. 1 (1986); *State v. Fortin*, 843 A.2d 974, 1010-15 (N.J. 2004).

RESPECTFULLY SUBMITTED this 1st day of March, 2012.

MARICOPA COUNTY PUBLIC DEFENDER

By /s/Lawrence Blieden
LAWRENCE BLIEDEN
Deputy Public Defender

MARICOPA COUNTY PUBLIC DEFENDER

By /s/Joel Brown
JOEL BROWN
Deputy Public Defender

Copy of the foregoing
delivered this 24th day of
March, 2012, to:

HONORABLE KAREN O'CONNOR
Judge of the Superior Court
SOUTH Court Tower 8A
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By /s/Lawrence Blieden
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Deputy Public Defender

LHB:cb

APPENDIX – O –

MICHAEL K. JEANES, CLERK
BY V. Rosales DEP
FILED

12 MAR 16 AM 7:58

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

THE STATE OF ARIZONA, Plaintiff, vs SHAWN PATRICK LYNCH, Defendant	CR 2001-092032 **OBJECTION TO DEFENDANT'S WAIVER OF RIGHT TO BE CONSIDERED FOR RELEASE-ELIGIBLE SENTENCE AND MOTION FOR JURY INSTRUCTION REGARDING RELEASE INFLIGIBILITY (SIMMONS INSTRUCTION)** (Assigned to the Honorable Karen L. O'Connor)

The State of Arizona, by the undersigned Deputy County Attorney, objects to defendant's request to waive his statutory right to be considered for a release eligible sentence should the jury return a verdict of life This response is supported by the attached Memorandum of Points and Authorities

Submitted March 15, 2012

WILLIAM G MONTGOMERY
MARICOPA COUNTY ATTORNEY

BY: /s/ [signature]
/s/ Juan M. Martinez
Deputy County Attorney

MEMORANDUM OF POINTS AND AUTHORITIES

I FACTS

Shawn Patrick Lynch and Michael Skokowsky Sehwani were charged with first degree murder (both felony and premeditated), armed robbery, burglary and kidnapping. Lynch was tried first. Although he was found guilty of all counts, the jury did not reach a unanimous verdict on premeditated murder

In the aggravation phase of the trial, the jury could not agree on whether the murder was committed in expectation of pecuniary gain. *See* A.R.S. § 13-751(F)(5)(2010) The jury also made a separate finding that the murder was both especially heinous and cruel, but could not decide whether the murder was especially depraved *See* A.R.S § 13-751(F)(6) In the penalty phase, the jury could not reach a unanimous verdict

A second jury was impaneled. That jury found both the (F)(5) aggravator and the depravity prong of the (F)(6)aggravator This jury returned a verdict sentencing Lynch to death. After a remand for a new penalty phase proceeding, trial is now set for April 23, 2012

Lynch has now filed a request to "presentence" himself should the jury return a verdict of life. His request should be denied since the court cannot abdicate its duty by meting out sentence before any evidence is presented.

II LAW AND ARGUMENT

Defendant argues that the State lacks standing to object to his waiver The State disagrees and believes it has standing to object. A "waiver [that] is knowing, intelligent and voluntary" requires the presence of the State and cannot be done *ex-parte* by

the court However, even if the court finds that the State has no standing, the State still has an affirmative duty to advise the court of all applicable case law

The case of *State v Dann*, 220 Ariz 351, 373, 207 P 3d 604, 626 (2009) held that a defendant may not "presentence" himself

> ¶ 123 Dann filed a pretrial "waiver" of his statutory right to parole and stipulated that, should he receive a sentence less than death, he would agree to be sentenced to life without parole Dann requested that the jury be advised of this "waiver" during the penalty phase. The court denied his request and gave a preliminary jury instruction that the possible sentences for Dann were "death, imprisonment for the remainder of his natural life, or imprisonment without the possibility of release until at least twenty-five calendar years have been served." The instructions also stated that if Dann did not receive a death sentence, the trial court would choose between the other possible sentences. Similarly, in the penalty phase, the trial judge instructed the jury that if Dann were not sentenced to death, the court would determine, on each conviction, whether he would serve a term of natural life or life without the possibility of release for twenty-five years, and would determine if the sentences would be concurrent or consecutive
>
> ¶ 124 Dann may not "presentence" himself The statute gives the trial court discretion to decide what penalty Dann should receive if spared the death penalty. *See* A.R.S § 13-751.A, 752.Q.

Id.

III. CONCLUSION

Lynch may not usurp the court's discretion and "presentence" himself should the jury return a verdict of life. Therefore, the court should deny his request to instruct the jury that he has waived his right to be considered for a release eligible sentence

Submitted March 15, 2012

WILLIAM G. MONTGOMERY
MARICOPA COUNTY ATTORNEY

BY: /s/ Juan Martinez
/s/ Juan M. Martinez
Deputy County Attorney

Copy mailed\delivered
March 15, 2012,
to:

The Honorable Karen L. O Connor
Judge of the Superior Court

Lawrence H. Blieden
620 W Jackson Street, Suite 4015
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BY: /s/ Juan Martinez
/s/ Juan M. Martinez
Deputy County Attorney

APPENDIX – P –

RECEIVED
DEC 14 2012
CLERK SUPREME COURT

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Appellee, vs SHAWN PATRICK LYNCH (A), Appellant	CR-12-0359-AP CR 2001-092032A

FILED
DEC 14 2012
JANET JOHNSON
CLERK SUPREME COURT
BY:

Phoenix, Arizona
April 6, 2012

BEFORE THE HONORABLE KAREN L O'CONNOR, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS
(Jury Trial)

JANELL ROSE, RPR, CSR
Certified Court Reporter #50455
Prepared for Appeal

Pages 2 through 5 omitted.

THE COURT All right The next we have is State's motion in limine regarding lingering doubt I didn't receive a response.

MR. BROWN Judge, that was filed in the last trial or the first trial It was phrased as residual doubt It was basically granted in favor of the State The defense was precluded from arguing there is any residual doubt as to whether Mr Lynch is guilty of first degree murder We didn't intend to offer that mitigator anyway

THE COURT Okay I'll grant that motion.

Then we have defendant's motion for retrial of aggravating circumstances. And I have the response Anything further on that?

MR. BROWN: No, Judge.

THE COURT Take that under advisement

Then we have the defendant's waiver of his right to be considered for life with parole, basically Well, I have an objection from the State

Anything further on that?

MR. BLIEDEN Not from the defense

THE COURT Then I have the Defendant's notice of mitigation regarding guilty verdicts The objection from the State and the defendant's reply Anything further on that?

Pages 7 through 32 omitted.

APPENDIX – Q –

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
04/25/2012 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 2001-092032 04/20/2012

HON. KAREN L. O'CONNOR

CLERK OF THE COURT
C. Smith
Deputy

STATE OF ARIZONA JUAN M MARTINEZ

v.

SHAWN PATRICK LYNCH (A) LAWRENCE H BLIEDEN
JOEL T BROWN

CAPITAL CASE MANAGER

RULINGS

The Court has considered the pleadings filed, heard argument and rules as follows:

State's Motion in Limine Regarding Argument Relating to Weight of Mitigation:

The State is correct that they cannot argue the following: that the mitigation evidence should not be considered at all because there is no nexus between the mitigation evidence and the crime. *Tennard v. Dretke*, 542 U.S. 274 (2004). The threshold for relevance of capital mitigating evidence is extremely low. *Id.* at 284-285. "[T]he question is simply whether the evidence is of such a character that it might serve as a basis for a sentence less than death." *Id.* at 287, *citing Skipper v. North Carolina*, 476 U.S. 1, 5 (1986)(internal quotation marks omitted).

However, it is also true that the Arizona Supreme Court has permitted the State to argue that certain mitigating evidence should be given little weight because it has little relevance to the crime. This argument has most recently been addressed in *State v. Villalobos*, 225 Ariz. 74, 83, 235 P.3d 227, 236 (Ariz., 2010):

> A jury cannot be precluded from hearing mitigation evidence because it lacks a causal nexus to the murder. *Tennard*, 542 U.S. at 284–87, 124 S.Ct. 2562. However, "there is

no constitutional prohibition against the State arguing that evidence is not particularly relevant or that it is entitled to little weight." *Anderson*, 210 Ariz. at 350 ¶ 97, 111 P.3d at 392; ***see also State v. Pandeli***, 215 Ariz. 514, 525–26 ¶¶ 31–32, 161 P.3d 557, 568–69 (2007). The jury may thus appropriately consider a lack of causal nexus when "assessing the quality and strength of mitigation." *Newell*, 212 Ariz. at 405 ¶ 82, 132 P.3d at 849.

Villalobos does not claim that the trial court excluded any evidence for lack of a causal nexus. Rather, he objects to the prosecutor's comments. We have repeatedly held, however, that the state may fairly argue that the lack of a nexus to the crime diminishes the weight to be given alleged mitigation. *See, e.g., Anderson*, 210 Ariz. at 350 ¶ 97, 111 P.3d at 392; *Pandeli*, 215 Ariz. at 525–26 ¶ 31, 161 P.3d at 568–69. Thus, the statements here were not improper. Moreover, the jury was properly instructed that it could consider any relevant evidence as mitigation and that it alone should determine the weight to attach to that mitigation. *See Pandeli*, 215 Ariz. at 526 ¶ 36, 161 P.3d at 569; *Roque*, 213 Ariz. at 224 ¶ 126, 141 P.3d at 399.

The United States Court of Appeals for the Ninth Circuit, while questioning the "wisdom" of the Arizona Supreme Court's position on this matter, has held that the Arizona Supreme Court making a "reasoned and individualized" decision to give a defendant's mitigating evidence little or no weight is not contrary to or an unreasonable application of clearly established federal law under 28 U.S.C. § 2254(d). *Towery v. Ryan*, __ F.3d __, 2012 WL 614677, slip op. at 10-11 (9th Cir. 2012).

Therefore,

IT IS ORDERED granting the motion.

State's Motion to Preclude Argument of Lingering Doubt as a Mitigating Factor:

The United States Supreme Court addressed this issue in *Franklin v. Lynaugh*, 487 U.S. 164, 174 (1988):

Our edict that, in a capital case, "'the sentencer ... [may] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense,' " Eddings v. Oklahoma, 455 U.S. 104, 110, 102 S.Ct. 869, 874, 71 L.Ed.2d 1 (1982)(quoting Lockett, 438 U.S., at 604, 98 S.Ct., at 2964), in no way mandates reconsideration by capital juries, in the sentencing phase, of their "residual doubts" over a defendant's guilt. Such lingering doubts are not over any aspect of petitioner's "character," "record," or a "circumstance of the offense." This Court's

prior decisions, as we understand them, fail to recognize a constitutional right to have such doubts considered as a mitigating factor.

This rule has been consistently followed by the Arizona Supreme Court. "A criminal defendant has no right to present evidence of residual doubt as a mitigating circumstance." *State v. Speer*, 221 Ariz. 449, 462, ¶ 68, 212 P.3d 787, 800 (2009). *See also State v. Harrod*, 218 Ariz. 268, 279-80 ¶¶ 39-46, 183 P.3d 519, 530-31(2008)(finding no constitutional or statutory right to present residual doubt evidence during the penalty phase); *State v. Cruz*, 218 Ariz. 149, 170 ¶ 133, 181 P.3d 196, 217 (2008)(holding that "a residual doubt instruction is not required by Arizona law" (citing *State v. Garza*, 216 Ariz. 56, 70 ¶ 67, 163 P.3d 1006, 1020 (2007)). Therefore,

IT IS ORDERED granting the motion.

State's Motion in Limine to Prohibit Defense Counsel from Asking Prospective Jurors Their Views on Specific Types of Mitigation or Aggravation, or Posing Hypothetical Scenarios of the Same:

Regarding the scope of voir dire, the Court intends to follow the law, as set forth by the United States Supreme Court and the Arizona Supreme Court.

The United States Supreme Court has held that prospective jurors must be asked whether they would automatically vote for a death sentence if a defendant is convicted; any juror who would do so must be struck for failure to be impartial. *Morgan v. Illinois*, 504 U.S. 719, 729 (1992). But a court is not required "to allow a defendant to voir dire potential jurors about specific mitigating circumstances." *State v. Johnson*, 212 Ariz. 425, 434, ¶ 31, 133 P.3d 735, 744 (2006). The same is true of specific aggravators. *State v. Smith*, 215 Ariz. 221, 231, ¶ 42, 159 P.3d 531, 541 (2007). *Morgan* was not meant to allow a defendant to "'speculate or precommit on how that juror might vote based on any particular facts.'" *Id.* (quoting *United States v. McVeigh*, 153 F.3d 1166, 1207 (10th Cir. 1998)). "A defendant does not have the right to 'commit [prospective jurors] to certain positions prior to receiving the evidence.'" *State v. Pandeli*, 215 Ariz. 514, 521, ¶ 9, 161 P.3d 557, 564 (2007)(quoting *State v. Melendez*, 121 Ariz. 1, 3, 588 P.2d 294, 296 (1978)).

However, the Court will allow the parties to ask case-specific questions during voir dire if the questions are appropriate. For example, in *State v. Garcia*, 224 Ariz. 1, 226 P.3d 370 (2010), the Arizona Supreme Court held that "[t]he trial court did not abuse its discretion in allowing the State to ask prospective jurors if they could consider imposing a death sentence if a defendant had not actually shot the victim." *Id.* at 9, ¶16, 226 P.3d at 378. The Court noted that in some cases, "highly general" questions may not be adequate to explore juror bias, and thus

more specific questions are required. *Id.* The Court distinguished *Smith* and *Johnson*, noting that in Garcia's case, the State did not ask potential jurors to "precommit to a specific position;" instead, the State asked jurors if they could consider the death penalty in circumstances in which Arizona law permits it. *Id.*

Thus, the Court will not allow questions that ask potential jurors to precommit to a specific position regarding aggravating circumstances or mitigating circumstances, or the death penalty in general. If appropriate, the Court will allow case-specific questioning that merely asks jurors if they could consider either life imprisonment or the death penalty when the law allows it. The Court will rule on specific questions when and if they are asked and an objection is raised by opposing counsel.

IT IS ORDERED granting the motion in part and denying it in part.

Defendant's Motion for Retrial of Aggravating Circumstances:

The Arizona Supreme Court remanded this case "for a new penalty phase proceeding on the murder conviction." *State v. Lynch*, 225 Ariz. 27, ¶89, 234 P.3d 595 (2010). The Court further instructed that "[a]ny new penalty phase jury should be instructed that the (F)(5) and (F)(6) aggravators have been previously found and that it is not to retry those issues. *See* A.R.S. § 13-752(K)." *Id.*

The defendant contends that despite these instructions, he is entitled to a retrial of the aggravating circumstances as well. However, this Court must follow the Supreme Court's instructions, which are clear and unambiguous.

IT IS ORDERED denying the motion.

Defendant's Notice of Mitigation Evidence re: Guilty Verdicts:

The defendant has noticed his intention to introduce into evidence the first jury's guilt phase verdict. This verdict shows that the jury unanimously found the defendant guilty of first degree murder, with seven jurors finding only the theory of felony murder and five jurors finding both theories of premeditated and felony murder. The State objects, asserting that the fact that there was a split between the theories is not relevant mitigation.

The Court finds that the actual verdict form is not a mitigating circumstance. It is not related to any aspect of the defendant's character, propensities or record, or circumstances of the offense. *See* A.R.S. § 13-751(G). The fact that some jurors decided that the State had failed to prove premeditated murder beyond a reasonable doubt while others decided the State had done

so, is not relevant mitigation, just as the fact that a prior jury was unable to decide the penalty is not relevant mitigation. It is improper to allow a subsequent jury to speculate about the subjective motives and mental processes of a prior jury.

The new jury will be instructed that the defendant has been convicted of first degree felony murder. This instruction will not foreclose the defendant from presenting evidence or argument about his co-defendant's involvement in the victim's death and his sentence for that offense.

IT IS ORDERED denying the motion.

Defendant's Waiver of Right to be Considered for Release-Eligible Sentence and Motion for Jury Instruction Regarding Release Ineligibility (Simmons Instruction):

The defendant contends that he can unilaterally waive the imposition of a release-eligible life sentence if the jury returns a life verdict in the penalty phase and requests that therefore the jury be instructed regarding the sentencing options that a life sentence will be without possibility of release for his natural life. The Arizona Supreme Court rejected this argument in *State v. Dann*, 220 Ariz. 351, 207 P.3d 604 (2009).

In *Dann*, the defendant requested that he be allowed to inform the jury that if it returned a life sentence, he would stipulate to being sentenced to life without parole. The Court held that the trial court did not abuse its discretion by refusing this request:

> "Dann may not 'presentence' himself. The statute gives the trial court discretion to decide what penalty Dann should receive if spared the death penalty. *See* A.R.S. §§ 13-751.A, 752.Q. Moreover, only speculation supports the notion that Dann's attempted waiver would have any effect on a future decision of the Arizona Board of Executive Clemency. *See Cruz*, 218 Ariz. at 160 ¶¶44-45, 181 P.3d at 207. The trial court did not abuse its discretion by refusing Dann's request to inform the jury he would waive parole if spared the death penalty." 220 Ariz. at ¶124.

The Court also finds the defendant's reliance on *State v. Fortin*, 843 A.2d 974 (N.J. 2004), to be misplaced. At the time Fortin committed his crime, New Jersey law provided for a life with possibility of parole sentence for murder. By the time of sentencing, however, the law no longer provided for a parole-eligible sentence but only for a sentence of life without parole. This sentence could apply to Fortin only if he waived his right to be free from *ex post facto* application of the new law. That is not the situation here. Arizona law still provides for two life

sentence options and as *Dann* holds, the defendant cannot unilaterally choose which sentence should be imposed.

IT IS ORDERED denying the motion.

This case is eFiling eligible: http://www.clerkofcourt.maricopa.gov/efiling/default.asp. Attorneys are encouraged to review Supreme Court Administrative Order 2011-140 to determine their mandatory participation in eFiling through AZTurboCourt.

APPENDIX – R –

FILED
7-17-12 2:24pm
MICHAEL K. JEANES, Clerk
By C. Smith
C. Smith, Deputy

Preliminary Jury Instructions

Hon. Karen O'Connor
Judge of the Superior Court

State of Arizona

v.

Shawn Patrick Lynch
CR2001-092032

Nature of the Hearing

Members of the jury, at this hearing, you will determine whether the Defendant will be sentenced to life imprisonment or death.

The Defendant has been convicted of the crime of first degree murder of James Stanley Panzarella, and two aggravating circumstances have been found to exist. You will hear that the crime occurred in 2001 and that testimony was presented in a prior proceeding. You are not to speculate or guess about the reasons for the delay from the time of the crime and the earlier proceeding resulting in the guilty verdict to the beginning of this hearing. You are not to consider the delay in any way nor should you think it is the fault of either the State or the Defendant. Under Arizona law, every person guilty of first degree murder shall be punished by death, or imprisonment for life without the possibility of release from prison, or imprisonment for life with the possibility of release after 25 years.

In this hearing, each juror will decide if mitigating circumstances exist and then, as a jury, you will decide whether to sentence the Defendant to life imprisonment or death. If the sentence is life imprisonment, then the court will sentence the Defendant to either life imprisonment without the possibility of release from prison, or life imprisonment with the possibility of release from prison after 25 years.

"Life without the possibility of release from prison" means exactly what it says. This sentence means the Defendant will never be eligible to be released from prison for any reason for the rest of his life. He will not be eligible for parole, work furlough, work release, or release from confinement on any basis, and his sentence cannot be commuted.

Duties of Jury

Jury service is an important part of our system of justice, with a long and distinguished tradition in American law. From the beginning, American law has viewed the jury system as an effective means of drawing on the collective wisdom, experience, and fact-finding abilities of persons such as yourselves. While it may be an occasional inconvenience or worse, jury service is an important responsibility for you, one which I am sure you will take seriously.

Now that you have been sworn, I will briefly tell you something about your duties as jurors and give you some preliminary instructions. At the end of the trial, I will give you more detailed instructions on the law and those instructions will control your deliberations.

The law that applies is stated in these instructions and it is your duty to follow all of them whether you agree with them or not. You must not single out certain instructions and disregard others.

You must not be influenced at any point in these proceedings by conjecture, passion, prejudice, public opinion or public feeling. You are not to be swayed by mere sympathy not related to the evidence presented during this hearing.

You must not be influenced by your personal feelings of bias or prejudice for or against the Defendant or any person involved in this case on the basis of anyone's race, color, religion, national ancestry, gender or sexual orientation.

Both the State and the Defendant have a right to expect that you will consider all the evidence, follow the law, exercise your discretion conscientiously and reach a just verdict.

I do not mean to indicate any opinion on the evidence or what your verdict should be by any ruling or remark I have made or may make during

this hearing. I am not allowed to express my feelings in this case, and if I have shown any you must disregard them. You and you alone are the triers of fact.

Performance of your duties as jurors is vital to the administration of justice.

Order of the Hearing

This hearing, unless otherwise directed by the Court, will proceed as follows:

The Defense may make an opening statement. The State may then make an opening statement or may defer until the close of the defense case. Again, what counsel says in opening statements is not evidence.

The victim's relatives may make a statement relating to the personal characteristics of the victim and the impact of his murder on his family. They are not allowed to offer any opinion or recommendation regarding an appropriate sentence. Victim impact evidence is not an aggravating circumstance and you cannot consider it as such. Victim impact evidence may be considered to rebut the mitigation presented. You are to consider this information only for this limited purpose.

The Defense may offer evidence in support of mitigation.

The State may make an opening statement if it was deferred, and may offer evidence in rebuttal to the Defense's mitigation evidence. This evidence is not a new aggravating circumstance.

The Defense may offer evidence in rebuttal to the State's evidence.

The Defendant may make a statement, but he is not required to do so. You cannot hold this against him if he chooses to not make a statement.

The Court will then give you the final instructions on the law.

The parties will present final arguments, with the defense having the opportunity to make an opening and a closing argument.

You will then deliberate to decide on a verdict. Once you agree on a verdict, you will return to court where the verdict will be read with the parties present.

Evidence

You are to apply the law to the evidence and in this way decide whether the Defendant will be sentenced to life imprisonment or death.

The evidence you shall consider consists of the testimony and exhibits the court will admit in evidence during this hearing.

It is the duty of the court to rule on the admissibility of evidence. You shall not concern yourselves with the reasons for these rulings. You shall disregard questions and exhibits that were withdrawn or to which objections were sustained.

Evidence that was admitted for a limited purpose shall not be considered for any other purpose.

You shall disregard testimony and exhibits that the court has not admitted, or the court has stricken.

The lawyers may stipulate certain facts exist. This means both sides agree that evidence exists and is to be considered by you during your deliberations at the conclusion of the trial. You are to treat a stipulation as any other evidence. You are free to accept it or reject it, in whole or in part, just as any other evidence.

In determining the penalty, you cannot reconsider the Defendant's conviction for first degree murder, or the finding of the existence of aggravating circumstances. During this hearing, the Defendant and the State may present any evidence that is relevant to the determination of whether

there is mitigation that is sufficiently substantial to call for a sentence less than death. The State may also present any evidence that demonstrates that the Defendant should not be shown leniency, which means a sentence less than death.

Mitigating circumstances may be found from any evidence presented during the hearing.

You should consider all of the evidence without regard to which party presented it. Each party is entitled to consideration of the evidence whether produced by that party or by another party.

You are the sole judges of the credibility of the witnesses and what weight is to be given the testimony of each witness. In considering the testimony of each witness you may take into account the opportunity and ability of the witness to observe, the witness' memory and manner while testifying, any interest, bias or prejudice the witness may have, the reasonableness of the testimony of the witness considered in a light of all the evidence, and any other factors that bear on credibility and weight.

The attorneys' remarks, statements and arguments are not evidence, but are intended to help you understand the evidence and apply the law.

The attorneys are entitled to make any objections that they deem appropriate. These objections should not influence you, and you should make no assumptions because of objections by the attorneys.

Statements of Defendant

If there is testimony in this case about what a defendant said to a law enforcement officer, you must not consider any such statements unless you determine beyond a reasonable doubt that the defendant made the statements voluntarily.

A defendant's statement to a law enforcement officer was not voluntary if it resulted from the defendant's will being overcome by a law enforcement officer's use of any sort of violence, coercion, or threats or by any direct or implied promise, however slight. You must give such weight to the Defendant's statement as you feel it deserves under all the circumstances.

Defendant Has No Obligation to Testify

The Defendant is not required to testify or make any statement and you are precluded from drawing any inferences against him should he decide not to testify or make a statement. The decision on whether or not to testify or make a statement is left to the Defendant acting with the advice of his attorneys. You must not let this choice affect your deliberation in any way.

Testimony of Law Enforcement Officers

The testimony of a law enforcement officer is not entitled to any greater or lesser importance or believability merely because of the fact that the witness is a law enforcement officer. You are to consider the testimony of a police officer just as you would the testimony of any other witness.

Expert Witness

A witness qualified as an expert by education or experience may state opinions on matters in that witness's field of expertise, and may also state reasons for those opinions. Expert opinion testimony should be judged just as any other testimony. You are not bound by it. You may accept it or reject it, in whole or in part, and you should give it as much credibility and weight as you think it deserves, considering the witness's qualifications and experience, the reasons given for the opinions, and all the other evidence in the case.

Exclusion of Witnesses

The Rule of Exclusion of Witnesses is in effect and will be observed by all witnesses until the hearing is over and a result announced. This means that all witnesses (except the victim's family, the parties and their designated investigators) will remain outside the courtroom during the entire trial except when one is called to the witness stand. They will wait in the areas directed by the bailiff unless other arrangements have been made with the attorney who has called them. The rule also forbids witnesses from telling anyone but the lawyers what they will testify about or what they have testified to. If witnesses do talk to the lawyers about their testimony, other witnesses and jurors should avoid being present or overhearing.

Each side is allowed to designate an investigator to assist them throughout the proceedings. That person is permitted to remain in the courtroom and is exempt from the rule of exclusion of witnesses.

The lawyers are directed to inform all their witnesses of these rules and to remind them of their obligations from time to time, as may be necessary. The parties and their lawyers should keep a careful lookout to

prevent any potential witness from remaining in the courtroom if they inadvertently enter.

First Degree Murder

It has already been determined that the Defendant is guilty of first degree murder. In this case, the crime of first degree murder means the following:

In this case the crime of first degree murder means the following:

1. Acting with one or more persons, the Defendant committed the crimes of Kidnapping, Armed Robbery and Burglary in the First Degree; and

2. That in the course and furtherance of these crimes, the Defendant or another person caused the death of James Panzarella.

Aggravating Circumstances

The following two aggravating factors were found to exist:

1 Defendant committed the murder in an especially heinous, cruel or depraved manner.

2. Defendant committed the murder as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

You must accept these aggravating circumstances as proven. These are the only aggravating circumstances you may consider in reaching your sentencing decision.

Aggravating Circumstances - Definitions

1. "Especially heinous, cruel or depraved":

The term "cruel" focuses on the victim's pain and suffering. Cruelty involves the infliction of physical pain and/or mental anguish on a victim before death. A crime is committed in an especially cruel manner when a Defendant either intended or knew that the manner in which the crime is committed would cause the victim to experience physical pain and/or mental anguish before death. The victim must be conscious for at least some portion of the time when the pain and/or anguish was inflicted.

The term "especially heinous or depraved" focuses upon the Defendant's state of mind at the time of the offense, as reflected by the Defendant's words and acts. A murder is especially heinous if it is hatefully or shockingly evil, in other words, grossly bad. A murder is especially depraved if it is marked by debasement, corruption, perversion or deterioration by the intentional infliction of gratuitous violence upon the victim beyond that necessary to kill. A Defendant knew or should have known that a fatal injury had been inflicted but continued to inflict violence.

2. "Consideration for the Receipt, or in Expectation of the Receipt, of Anything of Pecuniary Value":

This aggravating circumstance involves a Defendant's motive, cause or impetus for the commission of the first-degree murder when committed for the consideration for the receipt, or the expectation of receipt, of pecuniary value. "Pecuniary value" may be money or property.

Mere taking of items of value before, during or after the first-degree murder is not enough to establish this aggravating circumstance. There must be a connection between the motive and the killing. The mere fact that the person was killed, and the defendant made a financial gain, does not by itself establish this aggravating circumstance.

Degree of Participation

It has already been determined that the Defendant was a major participant in the commission of the crimes of Kidnapping, Armed Robbery and Burglary in the First Degree, and was recklessly indifferent regarding Mr. Panzarella's life.

Mitigation

In this hearing, the Defense and the State may present evidence that is relevant to your sentencing decision.

Mitigating circumstances are any factors that are a basis for a life sentence instead of a death sentence, so long as they relate to any sympathetic or other aspect of the Defendant's character, propensity, history or record, or circumstances of the offense.

Mitigating circumstances are not an excuse or justification for the offense, but are factors that in fairness or mercy may reduce the Defendant's moral culpability.

Mitigating circumstances may be offered by the Defendant or State or be apparent from the evidence presented at any phase of these proceedings. You are not required to find that there is a connection between a mitigating circumstance and the crime committed in order to consider the mitigation evidence. Any connection or lack of connection may impact the quality and strength of the mitigation evidence.

The circumstances proposed as mitigation by Shawn Lynch for your consideration in this case are:

1. The evidence is inconclusive as to whether it was Michael Sehwani or Shawn Lynch who used the knife to kill Mr. Panzarella.

2. The co-defendant, Michael Sehwani, received a life sentence in this case.

3. Shawn Lynch suffers from chronic Hepatitis C with cirrhosis of his liver and as a result, he has a significantly diminished life expectancy.

4. Shawn Lynch's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was

significantly impaired, but not so impaired as to constitute a defense to prosecution.

5. Shawn Lynch was raised in an unstable family filled with domestic violence.

6. As a child, Shawn Lynch suffered physical and emotional abuse from his father.

7 To punish Shawn Lynch for playing with matches, Shawn's father put Shawn's hands on a hot stove causing Shawn to be injured.

8. Shawn Lynch's mother and father periodically neglected him throughout his childhood.

9. Shawn Lynch was raised in a family where both parents suffered from alcoholism.

10. Shawn Lynch's younger brother committed suicide by a drug overdose.

11. Shawn Lynch suffered from drug abuse.

12. Shawn Lynch would not pose a danger to corrections employees/officers or other inmates if he receives a life sentence.

13. Shawn Lynch has been sentenced to a term of 21 years in the Arizona Department of Corrections for the convictions of Kidnapping, Armed Robbery and Burglary in the First Degree and these sentences have been ordered to run consecutively to whatever sentence he receives for the conviction of Murder in the First Degree.

You are not limited to these proposed mitigating circumstances in considering the appropriate sentence. You also may consider anything else related to the Defendant's character, propensity, history or record, or circumstances of the offense.

The fact that the Defendant has been convicted of first-degree murder

is unrelated to the existence of mitigating circumstances. You must give independent consideration to all of the evidence concerning mitigating circumstances, despite the conviction.

You may not consider any information presented during this hearing as a new aggravating circumstance.

Rebuttal Evidence

The State may submit evidence to rebut mitigation evidence. You may consider rebuttal evidence in individually determining the existence of a mitigating circumstance or in assessing the significance of that mitigating evidence. You shall not consider rebuttal evidence as aggravation.

Mitigation Assessment and the Sentence Burden Of Proof

While all twelve of you must unanimously agree regarding the appropriate sentence, you do not need to unanimously agree on a particular mitigating circumstance. Each one of you must decide individually whether any mitigating circumstance exists.

You are not limited to the mitigating circumstances offered by the Defendant. You must also consider any other information that you find is relevant in determining whether to impose a life sentence, so long as it relates to an aspect of the Defendant's background, character, propensities, record, or circumstances of the offense.

The Defendant bears the burden of proving the existence of any mitigating circumstance that the Defendant offers by a preponderance of the evidence. That is, although the Defendant need not prove its existence beyond a reasonable doubt, the Defendant must convince you by the evidence presented that it is more probably true than not true that such a mitigating circumstance exists. In proving a mitigating circumstance, the Defendant may rely on any evidence already presented and is not required to present additional evidence.

You individually determine whether mitigation exists. In light of the aggravating circumstances found, you must then individually determine if the total of the mitigation is sufficiently substantial to call for leniency. "Sufficiently substantial to call for leniency" means that mitigation must be of such quality or value that it is adequate, in the opinion of an individual juror, to persuade that juror to vote for a sentence of life in prison.

Even if a juror believes that the aggravating and mitigating circumstances are of the same quality or value, that juror is not required to vote for a sentence of death and may instead vote for a sentence of life in

prison. A juror may find mitigation and impose a life sentence even if the defendant does not present any mitigation evidence.

A mitigating factor that motivates one juror to vote for a sentence of life in prison may be evaluated by another juror as not having been proved or, if proved, as not significant to the assessment of the appropriate penalty. In other words, each of you must determine whether, in your individual assessment, the mitigation is of such quality or value that it warrants leniency in this case.

The law does not presume what is the appropriate sentence. The defendant does not have the burden of proving that life is the appropriate sentence. The State does not have the burden of proving that death is the appropriate sentence. It is for you, as jurors, to decide what you individually believe is the appropriate sentence.

In reaching a reasoned, moral judgment about which sentence is justified and appropriate, you must decide how compelling or persuasive the totality of the mitigating factors is when compared against the totality of the aggravating factors and the facts and circumstances of the case. This assessment is not a mathematical one, but instead must be made in light of each juror's individual, qualitative evaluation of the facts of the case, the severity of the aggravating factors, and the quality of the mitigating factors found by each juror.

If you unanimously agree there is mitigation sufficiently substantial to call for leniency, then you shall return a verdict of life. If you unanimously agree the mitigation is not sufficiently substantial to call for leniency, then you shall return a verdict of death.

Your decision is not a recommendation. Your decision is binding. If you unanimously find that the Defendant should be sentenced to life

imprisonment, your foreperson shall sign the verdict form indicating your decision. If you unanimously find that the Defendant should be sentenced to death, your foreperson shall sign the verdict form indicating your decision. If you cannot unanimously agree on the appropriate sentence, your foreperson shall tell the judge.

Jury Not to Consider Financial Cost of Penalty

You must decide the appropriate sentence based on the facts of the case and by applying these jury instructions. You must not consider the cost of any possible punishment when deciding whether to sentence the Defendant to life in prison or death.

Bench Conferences and Recesses

From time to time during the hearing, it may become necessary for me to talk with the attorneys out of the hearing of the jury, either by having a conference at the bench when the jury is present in the courtroom, or by calling a recess. Please understand that while you are waiting, we are working. The purpose of these conferences is not to keep relevant information from you, but to decide how certain evidence is to be treated under the rules of evidence and to avoid confusion and error. We will, of course, do what we can to keep the number and length of these conferences to a minimum. I may not always grant an attorney's request for a conference. Do not consider my granting or denying a request for a conference as any indication of my opinion of the case or of what your verdict should be. Please do not be concerned with what we are discussing at any bench conference we may have. Please respect the privacy of those participating in the bench conference in order to maintain

the fairness of the trial.

Juror Note Taking

At the end of the trial you will have to make your decision based on what you recall of the evidence. You should pay close attention to the testimony as it is given.

You have been provided with note pads and pens. The court encourages you to take notes during the trial if you wish to do so. Do not let note taking distract you so that you miss hearing or seeing other testimony. You may use your notes during your deliberations at the end of the trial. Until then, keep your notes to yourself. During recesses in the trial, you may leave your notes on your seat. Your notes are confidential and my bailiff will guard them. No one will be allowed to read your notes. Whether you take notes or not, you should rely upon your own memory of what was said and not be overly influenced by the notes of other jurors. After you have rendered your verdict, the bailiff will collect your notes and destroy them.

Do not be influenced at all by my taking notes at times. What I write down may have nothing to do with what you will be concerned with at this trial.

Admonition

I am now going to say a few words about your conduct as jurors. I am going to give you some dos and don'ts, mostly don'ts, which I will call "The Admonition."

Do wear your juror badge at all times in and around the courthouse so everyone will know you are on a jury.

Each of you has gained knowledge and information from the experiences you have had prior to this trial. Once this trial has begun you are to determine the facts of this case only from the evidence that is presented in this courtroom. Arizona law prohibits a juror from receiving evidence not properly admitted at trial. Therefore, do not do any research or make any investigation about the case on your own. Do not view or visit the locations where the events of the case took place. Do not consult any source such as a newspaper, a dictionary, a reference manual, television, radio, the Internet or any other electronic media for information. If you have a question or need additional information, submit your request **in writing** and I will discuss it with the attorneys.

Do not talk to anyone about the case, or about anyone who has anything to do with it, and do not let anyone talk to you about those matters, until the trial has ended, and you have been discharged as jurors. This prohibition about not discussing the case includes using e-mail, Facebook, MySpace, Twitter, instant messaging, Blackberry messaging, I-Phones, I-Touches, Google, Yahoo, or any internet search engine, or any other form of electronic communication for any purpose whatsoever, if it relates in any way to this case. This includes, but is not limited to, blogging about the case or your experience as a juror on this case, discussing the evidence, the lawyers, the parties, the court, your deliberations, your

reactions to testimony or exhibits or any aspect of the case or your courtroom experience with anyone whatsoever, until the trial has ended, and you have been discharged as jurors. Until then, you may tell people you are on a jury, and you may tell them the estimated schedule for the trial, but do not tell them anything else except to say that you cannot talk about the trial until it is over.

One reason for these prohibitions is because the trial process works by each side knowing exactly what evidence is being considered by you and what law you are applying to the facts you find. As I previously told you, the only evidence you are to consider in this matter is that which is introduced in the courtroom. The law that you are to apply is the law that I give you in the final instructions. This prohibits you from consulting any outside source.

If you have cell phones, laptops or other communication devices, please turn them off and do not turn them on while in the courtroom. You may use them only during breaks, so long as you do not use them to communicate about any matter having to do with the case. You are not permitted to take notes with laptops, Blackberries, tape recorders or any other electronic device. You are only permitted to take notes on the notepad provided by the court. Devices that can take pictures are prohibited and may not be used for any purpose.

It is your duty not to speak with or permit yourselves to be addressed by any person on any subject connected with the trial. If someone should try to talk to you about the case, stop him or her or walk away. If you should overhear others talking about the case, stop them or walk away. If anything like this does happen, report it to me or any member of my staff as soon as you can. To avoid even the appearance of improper

conduct, do not talk to any of the parties, the lawyers, the witnesses or media representatives about anything until the case is over, even if your conversation with them has nothing to do with the case. For example, you might pass an attorney in the hall, and ask what good restaurants there are downtown, and somebody from a distance may think you are talking about the case. So, again, please avoid even the appearance of improper conduct.

The lawyers and parties have been given the same instruction about not speaking with you jurors, so do not think they are being unfriendly to you. When you go home tonight and family and friends ask what the case is about, remember you cannot speak with them about the case. All you can tell them is that you are on a jury, the estimated schedule for the trial, and that you cannot talk about the case until it is over.

In a civil case, the jurors are permitted to discuss the evidence during the trial while the trial progresses. In a criminal case such as this, however, the jurors are not permitted to discuss the evidence until all the evidence has been presented and the jurors have retired to deliberate on the verdict. You may not discuss the evidence among yourselves until you retire to deliberate on your verdict. Therefore, during breaks and recesses whether you are assembled in the jury room or not, you shall not discuss any aspect of the case with each other until the case is submitted to you for your deliberations at the end of the trial. Again, if you have a question or need additional information, submit your request in writing and I will discuss it with the attorneys.

During the trial, you are not to engage in any conduct that impairs or interferes with your ability to hear and understand the court proceedings.

Do not form final opinions about any fact or about the outcome of

the case until you have heard and considered all of the evidence, the closing arguments, and the rest of the instructions I will give you on the law. Keep an open mind during the trial. Form your final opinions only after you have had an opportunity to discuss the case with each other in the jury room at the end of the trial.

Please advise me in writing immediately if you believe that any juror has violated any provision of this admonition.

Before each recess, I will not repeat the entire Admonition I have just given you. I will probably refer to it by saying, "Please remember the Admonition," or something like that. However, even if I forget to make any reference to it, remember that the Admonition still applies at all times during the trial.

Questions by Jurors

If at any time during the hearing you have difficulty hearing or seeing something that you should be hearing or seeing, or if you get into personal distress for any reason, raise your hand and let me know.

If you have any questions about parking, restaurants, or other matters relating to jury service, feel free to ask one of the court staff. But remember that the Admonition applies to court staff, as it does to everyone else, so do not try to discuss the case with court staff.

If you have a question about the case for a witness or for me, write it down, but do not sign it. Hand the question to the bailiff. If your question is for a witness who is about to leave the witness stand, please signal the bailiff or me before the witness leaves the stand.

The lawyers and I will discuss the question. The rules of evidence or other rules of law may prevent some questions from being asked. If the rules

permit the question and the answer is available, an answer will be given at the earliest opportunity. When we do not ask a question, it is no reflection on the person submitting it. You should attach no significance to the failure to ask a question. I will apply the same legal standards to your questions as I do to the questions asked by the lawyers. If a particular question is not asked, please do not guess why or what the answer might have been.

Schedule During Hearing

The hearing is expected to last through September 10, 2012. We will do our best to move the case along, but delays frequently occur. These won't be anyone's fault, so please don't hold them against the parties. Delays usually occur because the attorneys and I often need to resolve certain legal matters before these matters may be presented to you in court or because I am busy with emergency matters in other cases.

The usual hours of hearing will be from 10:30 a.m. to 4:30 p.m. We will take a short recesses mid-afternoon. Unless a different starting time is announced prior to recessing for the evening, you may assume a starting time of 10:30 a.m. for the next day.

At the beginning of the day, please assemble in the lobby area of the 8th floor.

Media Coverage

There may or may not be news media coverage of the hearing. What the news media covers is up to them. If there is media coverage, you must avoid it during the hearing. If you do encounter something about this case in the news media during the hearing, end your exposure to it immediately and report to me as soon as you can.

If there are cameras in the courtroom during the hearing, do not be concerned about them. Court rules require that the proceedings be photographed or televised in such a way that no juror can be recognized.

Alternate Jurors

The law provides for a jury of twelve persons in a case such as this. We seat alternate jurors so that, if a juror becomes ill or has a personal emergency, the hearing can continue without that juror. Please do not speculate about whether you may or may not be chosen as an alternate juror at a later time. In Arizona, alternate jurors are selected by lot at the end of a case, so at this time we do not know who the alternates will be.

Keep an Open Mind

Do not form final opinions about any fact or about the outcome of the case until you have heard and considered all of the evidence, the closing arguments, and the rest of instructions I will give you on the law. Keep an open mind. Form your final opinions only after you have had an opportunity to discuss the case with each other in the jury room at the end of this hearing.

Conclusion to Preliminary Instructions

The rules of law and instructions I have just shared with you are preliminary only. At the conclusion of the evidence, I will read to you and give you a copy of the final instructions that you must follow in your deliberation.

At our next recess, the bailiff is going to escort you out a different way and show you the jury room where you will report. Do not return to the courtroom until you are summoned by the bailiff.

APPENDIX – S –

FILED
8-9-12 3:33pm
MICHAEL K. JEANES, Clerk
By C. Smith
C. Smith, Deputy

Final Jury Instructions

Hon. Karen O'Connor
Judge of the Superior Court

State of Arizona

v.

Shawn Patrick Lynch
CR2001-092032

Duties of Jury

Members of the jury, you will now determine whether the Defendant will be sentenced to life imprisonment or death.

The law that applies is stated in these instructions and it is your duty to follow all of them whether you agree with them or not. You must not single out certain instructions and disregard others.

You must not be influenced at any point in these proceedings by conjecture, passion, prejudice, public opinion or public feeling. You are not to be swayed by mere sympathy not related to the evidence presented during this hearing.

You must not be influenced by your personal feelings of bias or prejudice for or against the Defendant or any person involved in this case on the basis of anyone's race, color, religion, national ancestry, gender or sexual orientation.

Both the State and the Defendant have a right to expect that you will consider all the evidence, follow the law, exercise your discretion conscientiously and reach a just verdict.

I do not mean to indicate any opinion on the evidence or what your verdict should be by any ruling or remark I have made or may make during this hearing. I am not allowed to express my feelings in this case, and if I have shown any you must disregard them. You and you alone are the triers of fact.

Performance of your duties as jurors is vital to the administration of justice.

BURDEN OF PROOF STANDARDS-DEFINITIONS

Three standards of burden of proof were mentioned by the parties during this Penalty Phase:

1. Preponderance of the evidence;
2. Clear and convincing evidence;
3. Beyond a reasonable doubt.

Preponderance of the Evidence – A party having the burden of proof by a preponderance of the evidence must persuade you, by the evidence, that the claim or a fact is more probably true than not true. This means the evidence that favors that party outweighs the opposing evidence.

Clear and Convincing Evidence – A party having the burden of proof by clear and convincing evidence must persuade you, by the evidence, that the claim or a fact is highly probable. This standard is higher than the standard for proof by a preponderance of the evidence, but is lower than the standard for proof beyond a reasonable doubt.

Beyond a Reasonable Doubt – Proof beyond a reasonable doubt is proof, by the evidence, that leaves you firmly convinced of the defendant's guilt of the charged crimes in first phase of the trial, and that the aggravating circumstances exist in the second phase of the trial. The State already met this burden in the first two phases of this trial. This standard of proof is higher than the standard for either proof by a preponderance of the evidence or proof by clear and convincing evidence.

Evidence

You are to apply the law to the evidence and in this way decide whether the Defendant will be sentenced to life imprisonment or death.

The evidence you shall consider consists of the testimony of witnesses and exhibits the court has admitted in evidence during this hearing.

It is the duty of the court to rule on the admissibility of evidence. You shall not concern yourselves with the reasons for these rulings. You shall disregard questions and exhibits that were withdrawn or to which objections were sustained.

Evidence that was admitted for a limited purpose shall not be considered for any other purpose.

You shall disregard testimony and exhibits that the court has not admitted, or the court has stricken.

The lawyers may stipulate certain facts exist. This means both sides agree that evidence exists and is to be considered by you during your deliberations at the conclusion of the trial. You are to treat a stipulation as any other evidence. You are free to accept it or reject it, in whole or in part, just as any other evidence.

In determining the penalty, you cannot reconsider the Defendant's conviction for first degree murder, or the finding of the existence of aggravating circumstances. During this hearing, the Defendant and the State presented evidence that may be relevant to the determination of whether there is mitigation that is sufficiently substantial to call for a sentence less than death. The State also presented evidence that may demonstrate that the Defendant should not be shown leniency. Leniency means a sentence less than death.

Mitigating circumstances may be found from any evidence presented

during the hearing.

You should consider all of the evidence without regard to which party presented it. Each party is entitled to consideration of the evidence whether produced by that party or by another party.

You are the sole judges of the credibility of the witnesses and what weight is to be given the testimony of each witness. In considering the testimony of each witness you may take into account the opportunity and ability of the witness to observe, the witness' memory and manner while testifying, any interest, bias or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on credibility and weight.

The attorneys' remarks, statements and arguments are not evidence, but are intended to help you understand the evidence and apply the law.

The attorneys are entitled to make any objections that they deem appropriate. These objections should not influence you, and you should make no assumptions because of objections by the attorneys.

Rulings of Court

Admission of evidence in court is governed by rules of law. I have applied those rules during this hearing and resolved any issues concerning the admission of evidence.

The attorneys are entitled to make any objections that they deem appropriate. These objections should not influence you, and you should make no assumptions because of objections by the attorneys.

If an objection to a question was sustained, you must disregard the question and you must not guess what the answer to the question might have been. If an exhibit was offered into evidence and an objection to it was sustained, you must not consider that exhibit as evidence. If testimony was ordered stricken from the record, you must not consider that testimony for any purpose. If evidence was admitted for a limited purpose, you shall consider that evidence only for that limited purpose.

Do not concern yourselves with the reasons for my rulings on the admission of evidence. Do not regard those rulings as any indication from me of the credibility of the witnesses or the weight you should give to any evidence that has been admitted.

Defendant Has No Obligation to Testify

The Defendant is not required to testify or make any statement and you are precluded from drawing any inferences against him should he decide not to testify or make a statement. The decision on whether or not to testify or make a statement is left to the Defendant acting with the advice of his attorneys. You must not let this choice affect your deliberation in any way.

Testimony of Law Enforcement Officers

The testimony of a law enforcement officer is not entitled to any greater or lesser importance or believability merely because of the fact that the witness is a law enforcement officer. You are to consider the testimony of a police officer just as you would the testimony of any other witness.

Expert Witness

A witness qualified as an expert by education or experience may state opinions on matters in that witness's field of expertise, and may also state reasons for those opinions. Expert opinion testimony should be judged just as any other testimony. You are not bound by it. You may accept it or reject it, in whole or in part, and you should give it as much credibility and weight as you think it deserves, considering the witness's qualifications and experience, the reasons given for the opinions, and all the other evidence in the case.

Closing Arguments

In a few minutes, the lawyers will give their closing arguments and tell you what sentence they believe you should impose. They will discuss the law and the evidence. What the lawyers say in their closing arguments is not evidence, but it may assist you in understanding the law and the evidence. Again, the law you are to apply is set forth in these instructions.

First Degree Murder

It has already been determined that the Defendant is guilty of First Degree Murder. In this case, the crime of First Degree Murder means the following:

1. Acting with one or more persons, the Defendant committed the crimes of Kidnapping, Armed Robbery and Burglary in the First Degree; and

2. That in the course and furtherance of these crimes, the Defendant or another person caused the death of James Panzarella.

Aggravating Circumstances

The following two aggravating factors were found to exist:

1 Defendant committed the murder in an especially heinous, cruel or depraved manner

2. Defendant committed the murder as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

You must accept these aggravating circumstances as proven. These are the only aggravating circumstances you may consider in reaching your sentencing decision.

Aggravating Circumstances - Definitions

1. "Especially heinous, cruel or depraved":

The term "cruel" focuses on the victim's pain and suffering. Cruelty involves the infliction of physical pain and/or mental anguish on a victim before death. A crime is committed in an especially cruel manner when a Defendant either intended or knew that the manner in which the crime is

committed would cause the victim to experience physical pain and/or mental anguish before death. The victim must be conscious for at least some portion of the time when the pain and/or anguish was inflicted.

The term "especially heinous or depraved" focuses upon the Defendant's state of mind at the time of the offense, as reflected by the Defendant's words and acts. A murder is especially heinous if it is hatefully or shockingly evil, in other words, grossly bad. A murder is especially depraved if it is marked by debasement, corruption, perversion or deterioration by the intentional infliction of gratuitous violence upon the victim beyond that necessary to kill. A Defendant knew or should have known that a fatal injury had been inflicted but continued to inflict violence.

2. "Consideration for the Receipt, or in Expectation of the Receipt, of Anything of Pecuniary Value":

This aggravating circumstance involves a Defendant's motive, cause or impetus for the commission of the first-degree murder when committed for the consideration for the receipt, or the expectation of receipt, of pecuniary value. "Pecuniary value" may be money or property.

Mere taking of items of value before, during or after the first-degree murder is not enough to establish this aggravating circumstance. There must be a connection between the motive and the killing. The mere fact that the person was killed, and the defendant made a financial gain, does not by itself establish this aggravating circumstance.

Degree of Participation

It has already been determined that the Defendant was a major participant in the commission of the crimes of Kidnapping, Armed Robbery and Burglary in the First Degree, and was recklessly indifferent regarding Mr. Panzarella's life.

Victim Impact Information

Relatives of the victim made a statement relating to the personal characteristics and uniqueness of the victim and the impact of the murder on his family. You may consider this information to the extent that it rebuts mitigation. You may not consider the information as a new aggravating circumstance.

Mitigation

In this hearing, the Defense and the State presented evidence that may be relevant to your sentencing decision.

Mitigating circumstances are any factors that are a basis for a life sentence instead of a death sentence, so long as they relate to any sympathetic or other aspect of the Defendant's character, propensity, history or record, or circumstances of the offense.

Mitigating circumstances are not an excuse or justification for the offense, but are factors that in fairness or mercy may reduce the Defendant's moral culpability.

Mitigating circumstances may be offered by the Defendant or State or

be apparent from the evidence presented. You are not required to find that there is a connection between a mitigating circumstance and the crime committed in order to consider the mitigation evidence. Any connection or lack of connection may impact the quality and strength of the mitigation evidence.

The circumstances proposed as mitigation by Shawn Lynch for your consideration in this case are:

1 The evidence is inconclusive as to whether it was Michael Sehwani or Shawn Lynch who used the knife to kill Mr. Panzarella.

2. The co-defendant, Michael Sehwani, received a life sentence in this case.

3. Shawn Lynch suffers from chronic Hepatitis C with cirrhosis of his liver and as a result, he has a significantly diminished life expectancy.

4. Shawn Lynch's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.

"Significantly impaired" means that a defendant suffered from substance abuse and/or alcohol abuse at or near the time of the offense, that prevented him from appreciating the wrongfulness of the conduct or conforming his conduct to the requirements of the law.

5. Shawn Lynch was raised in an unstable family filled with domestic violence.

6. As a child, Shawn Lynch suffered physical and emotional abuse from his father.

7 To punish Shawn Lynch for playing with matches, Shawn's father put Shawn's hands on a hot stove causing Shawn to be injured.

8. Shawn Lynch's mother and father periodically neglected him throughout his childhood.

9. Shawn Lynch was raised in a family where both parents suffered from alcoholism.

10. Shawn Lynch's younger brother committed suicide by a drug overdose.

11 Shawn Lynch suffered from drug abuse.

12. Shawn Lynch would not pose a danger to corrections employees/officers or other inmates if he receives a life sentence.

13. Shawn Lynch has been sentenced to a term of 21 years in the Arizona Department of Corrections for the convictions of Kidnapping, Armed Robbery and Burglary in the First Degree and these sentences have been ordered to run consecutively to whatever sentence he receives for the conviction of Murder in the First Degree.

You are not limited to these proposed mitigating circumstances in considering the appropriate sentence. You also may consider anything else related to the Defendant's character, propensity, history or record, or circumstances of the offense.

The fact that the Defendant has been convicted of first-degree murder is unrelated to the existence of mitigating circumstances. You must give independent consideration to all of the evidence concerning mitigating circumstances, despite the conviction.

You may not consider any information presented during this hearing as a new aggravating circumstance.

Rebuttal Evidence

The State may submit evidence to rebut mitigation evidence. You may consider rebuttal evidence in individually determining the existence of a mitigating circumstance or in assessing the significance of that mitigating evidence. You shall not consider rebuttal evidence as aggravation.

Mitigation Assessment and Burden Of Proof

While all twelve of you must unanimously agree regarding the appropriate sentence, you do not need to unanimously agree on a particular mitigating circumstance. Each one of you must decide individually whether any mitigating circumstance exists.

You are not limited to the mitigating circumstances offered by the Defendant. You must also consider any other information that you find is relevant in determining whether to impose a life sentence, so long as it relates to an aspect of the Defendant's background, character, propensities, record, or circumstances of the offense.

The Defendant bears the burden of proving the existence of any mitigating circumstance that the Defendant offers by a preponderance of the evidence. That is, although the Defendant need not prove its existence beyond a reasonable doubt, the Defendant must convince you by the evidence presented that it is more probably true than not true that such a mitigating circumstance exists.

You individually determine whether mitigation exists. In light of the aggravating circumstances found, you must then individually determine if the total of the mitigation is sufficiently substantial to call for leniency. "Sufficiently substantial to call for leniency" means that mitigation must be of such quality or value that it is adequate, in the opinion of an individual juror, to persuade that juror to vote for a sentence of life in prison.

Even if a juror believes that the aggravating and mitigating circumstances are of the same quality or value, that juror is not required to vote for a sentence of death and may instead vote for a sentence of life in prison. A juror may find mitigation and impose a life sentence even if the defendant does not present any mitigation evidence.

A mitigating factor that motivates one juror to vote for a sentence of life in prison may be evaluated by another juror as not having been proved or, if proved, as not significant to the assessment of the appropriate penalty. In other words, each of you must determine whether, in your individual assessment, the mitigation is of such quality or value that it warrants leniency in this case.

The law does not presume what is the appropriate sentence. The defendant does not have the burden of proving that life is the appropriate sentence. The State does not have the burden of proving that death is the appropriate sentence. It is for you, as jurors, to decide what you individually believe is the appropriate sentence.

In reaching a reasoned, moral judgment about which sentence is justified and appropriate, you must decide how compelling or persuasive the totality of the mitigating factors is when compared against the totality of the aggravating factors and the facts and circumstances of the case. This assessment is not a mathematical one, but instead must be made in light of each juror's individual, qualitative evaluation of the facts of the case, the severity of the aggravating factors, and the quality of the mitigating factors found by each juror.

If you unanimously agree there is mitigation sufficiently substantial to call for leniency, then you shall return a verdict of life. If you unanimously agree there is no mitigation, or the mitigation is not sufficiently substantial to call for leniency, then you shall return a verdict of death.

Your decision is not a recommendation. Your decision is binding. If you unanimously find that the Defendant should be sentenced to life imprisonment, your foreperson shall sign the verdict form indicating your decision. If you unanimously find that the Defendant should be sentenced

to death, your foreperson shall sign the verdict form indicating your decision. If you cannot unanimously agree on the appropriate sentence, your foreperson shall tell the judge.

Jury Not to Consider Financial Cost of Penalty

You must decide the appropriate sentence based on the facts of the case and by applying these jury instructions. You must not consider the cost of any possible punishment when deciding whether to sentence the Defendant to life in prison or death.

Duty to Confer And Consult With Other Jurors

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a just verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and change your opinion if you become convinced that it is wrong. However, you should not change your honest belief concerning the weight or effect of the evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict.

Closing Instructions

Deliberation Guidelines

When you retire to the jury room your first task is to choose a foreperson. He or she will preside over your deliberations. You should discuss and then set your deliberation schedule. You are in charge of your schedule, and may set and vary it by agreement and the approval of the Court. After you have set your schedule, please send it to me by a note through the bailiff for my review and approval.

After setting your schedule and before discussing the evidence, I suggest that you next review the jury instructions and verdict form. It is very helpful for you to discuss and understand the instructions and form before discussing the evidence. Again, during your deliberations you must follow the instructions and refer to them to answer any questions about applicable law, procedure, definitions, etc.

You are to discuss the case and deliberate only when all jurors are together in the jury room. You are not to discuss the case with each other or anyone else during breaks or recesses.

The admonition I have given you during the hearing remains in effect when you are not deliberating.

Questions and Messages

Should any of you, or the jury as a whole, have a question or message for the court during your deliberations, please write it out on the question form provided. All questions or messages must be communicated to the court in writing and must be signed by you or the foreperson.

The court will consider your question or note and, if necessary, consult with counsel before answering it. The court will answer it as quickly as possible.

No member of the jury should ever attempt to communicate with me except by a signed writing, and I will communicate with you on anything concerning the case only in writing, or orally with a court reporter present.

Remember that you are not to tell anyone – including me – how you stand, numerically or otherwise, until after you have reached a verdict or have been discharged. In your notes to me, do not indicate how you stand.

Verdict

Any verdict of life imprisonment or death must be unanimous. Your decision is not a recommendation. Your decision will be binding. If your verdict is that the Defendant should be sentenced to death, he will be sentenced to death. If your verdict is that the Defendant should be sentenced to life, he will not be sentenced to death, and the court will sentence him to either life without the possibility of release until at least 25 calendar years in prison are served, or "natural life," which means the Defendant would never be released from prison.

The law requires that you reduce to writing your finding regarding the Defendant's sentence. You must indicate this finding on the verdict form, and this verdict form must be signed by your foreperson.

You will be given one form of verdict. It reads as follows:

ORIGINAL

No. 15–8366

Supreme Court, U.S.
FILED
MAR 29 2016
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

SHAWN PATRICK LYNCH,
PETITIONER,

-vs-

STATE OF ARIZONA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARIZONA

BRIEF IN OPPOSITION

MARK BRNOVICH
ATTORNEY GENERAL

JOHN R. LOPEZ IV
SOLICITOR GENERAL

LACEY STOVER GARD
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ATTORNEYS FOR RESPONDENT

CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

1. Did the Arizona Supreme Court commit federal constitutional error when it affirmed the trial court's denial of Petitioner's challenge of the State's exercise of peremptory strikes pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986)?

2. Did the Arizona Supreme Court commit federal constitutional error when it determined that Lynch was not entitled to an instruction pursuant to *Simmons v. South Carolina*, 512 U.S. 154 (1994)?

3. Did the Arizona Supreme Court commit federal constitutional error when it rejected Lynch's claim that the prosecutor engaged in misconduct that deprived him of a fair trial?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINION BELOW 1

STATEMENT OF JURISDICTION 1

PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 5

CONCLUSION 16

TABLE OF AUTHORITIES

Cases	Page
Batson v. Kentucky, 476 U.S. 79 (1986)	i, 3, 4, 5, 6, 7, 8, 9
Edwards v. Roper, 688 F.3d 449 (8th Cir. 2012)	7
Hightower v. Terry, 459 F.3d 1067 (11th Cir. 2006)	8
Jacox v. Pegler, 665 N.W.2d 607 (Neb. 2003)	8
McKinney v. Artuz, 326 F.3d 87 (2d Cir. 2003)	7
Messiah v. Duncan, 435 F.3d 186 (2d Cir. 2006)	7
Miller-El v. Cockrell, 537 U.S. 322 (2003)	7
Miller-El v. Dretke, 545 U.S. 231 (2005)	10
Purkett v. Elem, 514 U.S. 765 (1995)	6
Ramdass v, Angelone, 530 U.S. 156 (2000)	5, 12
Simmons v. South Carolina, 512 U.S. 154 (1994)	i, 4, 5, 6, 11, 12, 13, 14
State v. Benson, 307 P.3d 19 (Ariz. 2013)	13
State v. Dann, 207 P.3d 604 (Ariz. 2009)	13
State v. Hardy, 283 P.3d 12 (Ariz. 2012)	12
State v. Hargrave, 234 P.3d 569 (Ariz. 2010)	13
State v. Lynch, 357 P.3d 119 (Ariz. 2015)	1, 2, 4, 10, 14, 15, 16
State v. McCullough, 270 P.3d 1142 (Kan. 2012)	8
Stevens v. Epps, 618 F.3d 489 (5th Cir. 2010)	7
United States v. Alanis, 611 F.2d 123 (5th Cir. 1980)	15
United States v. Alanis, 445 U.S. 955 (1980)	15
United States v. Daychild, 357 F.3d 1082 (9th Cir. 2004)	15
United States v. McAllister, 693 F.3d 572 (6th Cir. 2012)	10
United States v. McCarthy, 54 F.3d 51 (2d Cir. 1995)	15
United States v. Rutledge, 648 F.3d 555 (2011)	10
United States v. Washington, 462 F.3d 1124 (9th Cir. 2006)	15
United States v. Weinstein, 762 F.2d 1522 (11th Cir. 1985)	14
Weinstein v. United States, 475 U.S. 1110 (1986)	14

Constitutional Provisions

U.S. Const., amend. VIII 1
U.S. Const., amend. XIV 1
U.S. Const., art. III, § 2 1

Statutes

A.R.S. § 13-703(A) (2001) 12, 14
28 U.S.C. § 1257(a) 1

Rules

Sup. Ct. R. 10. ..... 1, 5
Sup. Ct. R. 10(b). 16
Sup. Ct. R. 10(c) 16

OPINION BELOW

The Arizona Supreme Court affirmed Petitioner's convictions and sentences in an opinion reported at *State v. Lynch*, 357 P.3d 119 (Ariz. 2015), and included in the Appendix to Petitioner's petition for writ of certiorari. (Pet. App. A.)

STATEMENT OF JURISDICTION

This Court has jurisdiction under Article III, Section 2 of the United States Constitution; 28 U.S.C. § 1257(a); and United States Supreme Court Rule 10. The Arizona Supreme Court entered its judgment on September 10, 2015, and denied Petitioner's motion for reconsideration on November 30, 2015. (Pet. App. A, F.) Petitioner timely filed his petition on February 25, 2016.

PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Arizona Supreme Court summarized the facts of Petitioner's murder of James Panzarella in its opinion in this case:

> The victim, James Panzarella, was seen at a Scottsdale bar with Lynch and Michael Sehwani on March 24, 2001. Lynch, Sehwani, and Panzarella went to Panzarella's residence early the next morning. Later that morning, Sehwani used Panzarella's American Express card at a supermarket. Ten minutes later, the card was reported lost. Sehwani again used the card at a convenience store and unsuccessfully attempted to use it at a department store. The same day, Panzarella's Bank One card was used at a restaurant, a convenience store, and a motel. The Bank One card was used the following day to make a cash withdrawal and various purchases, including Everlast shoes.
>
> The next afternoon, Panzarella was found in his home tied to a chair with his throat slit. Police also found credit card receipts from purchases made that morning at a supermarket and convenience store.
>
> Police arrested Lynch and Sehwani that afternoon as they entered a truck in a motel parking lot. Sehwani was wearing Everlast shoes and had Panzarella's credit cards and checks in his wallet. In the truck and a motel room, police found keys to Panzarella's car, a sweater with Panzarella's blood on it, and a .45 caliber pistol belonging to Panzarella. Blood on Lynch's shoes matched Panzarella's DNA.

Lynch, 357 P.3d at 126.

A jury found Petitioner guilty of first-degree murder, armed robbery, burglary, and kidnapping. *Lynch*, 357 P.3d at 126. In the trial's first penalty phase, the jury could not reach a unanimous verdict regarding whether to sentence Lynch to death. *Id.* at 126-27 A second penalty-phase jury found that two aggravating factors existed because the murder was especially depraved and committed for pecuniary gain, and sentenced Lynch to death. *Id.* at 127. On appeal, however, the Arizona Supreme Court remanded for a new jury sentencing

because the trial court had given the jury an erroneous instruction on one of the alleged aggravating circumstances. *Id.*

During jury selection for resentencing on remand, Petitioner challenged the State's exercise of five of its peremptory strikes to exclude Hispanic prospective jurors pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986). (Pet. App. J at 10.) The prosecutor provided race-neutral reasons for each of its strikes. Specifically, the prosecutor stated that he struck Number 255 because "she indicated that she is philosophically opposed to the death penalty." (Pet. App. J at 10.) He stated that he struck Number 49 because she had served on two juries that had hung and he was convinced that "if this juror is seated this woman will hang this jury and will, in fact, result in a victory for the defense." (Pet. App. J at 11.) The prosecutor further explained that he struck Number 34 because he had visible tattoos on both legs and one arm, and the prosecutor did not want to seat a juror who could identify with Petitioner, who had contracted hepatitis C from receiving a tattoo in jail. (Pet. App. J at 12-13.) With respect to Number 32, the prosecutor stated that "his facial hair resembles ZZ Top" and "looks like a billy goat," and his hair was in a "very long ponytail" that looked "like Jerry Garcia." (Pet. App. J at 13.) The prosecutor stated that he would have struck anybody with that type of grooming and noted that he had requested to strike a white juror in part because he had long hair and facial hair. (Pet. App. J at 14.) The prosecutor explained that he struck Number 8 because her brother had been convicted of child abuse, and one of the mitigating circumstances in Petitioner's case was that there was some sort of abuse in his past.

(Pet. App. J at 14.) In addition, the prosecutor stated that there was "a lot of sexual innuendo involved in this case." (Pet. App. J at 14.)

The trial court found that the "reasons given for the State's striking Juror numbers 8, 32, 34, 49 and 255 are all race neutral" and allowed the strikes. (Pet. App. J at 15.) Petitioner then claimed that the reasons given for the strikes of Numbers 32 and 34 "did not cure or justify the strikes and the reasons given by the State's attorney support the contention that they were struck for reasons of ethnicity or race." (Pet. App. J at 15.) The trial court made no further comment regarding the challenge. (Pet. App. J at 15.)

At his remanded jury sentencing, Petitioner also filed a waiver of his right to be considered for a release-eligible sentence and a motion for a jury instruction regarding release ineligibility pursuant to *Simmons v. South Carolina*, 512 U.S. 154 (1994). (Pet. App. N.) The trial court denied the motion. (Pet. App. Q.) Lynch was again sentenced to death. *Lynch*, 357 P.3d at 127.

On appeal, Lynch argued, as pertinent here, that the State engaged in prosecutorial misconduct in several ways, individually and in combination; the trial court erred by refusing to give a *Simmons* instruction; and the trial court violated *Batson v. Kentucky*, when it permitted the State to strike five Hispanic jurors over his objection. (Pet. App. B.) The Arizona Supreme Court rejected each argument. First, the court determined that, although the prosecutor made "some improper remarks, they did not amount to persistent and pervasive misconduct that deprived Lynch of a fair trial." *Lynch*, 357 P.3d at 135. Second, the court concluded that

refusing a *Simmons* instruction was not error because the sentencing statute in effect at the time of the murder authorized the imposition of release-eligible sentences, and "'*Simmons* applies only to instances where, as a legal matter, there is *no possibility* of parole if the jury decides the appropriate sentence is life in prison.'" *Id.* at 138 (quoting *Ramdass v. Angelone*, 530 U.S. 156, 159 (2000)). Finally, the court found that the trial court had "implicitly rul[ed] that Lynch did not carry his burden of proving purposeful discrimination" and concluded that the fact that the prosecutor did not ask follow-up voir dire questions did not establish that the strikes were pretextual. *Id.* at 139.

REASONS FOR DENYING THE WRIT

This case presents no reason, much less a compelling one, for this Court to grant a writ of certiorari. *See* Sup. Ct. R. 10 (compelling reasons include decision that decides an important federal question in conflict with other state court of last resort or United States court of appeals, decides an important question of federal law that has not been settled by this Court, or decides an important federal question in conflict with relevant decisions of this Court). First, the Arizona Supreme Court properly concluded that the trial court had implicitly conducted step three of the *Batson* analysis when it denied Petitioner's challenge. Moreover, even if there is a split of authority regarding the reviewing court's role when the trial court fails to explain its reasoning under step three of the *Batson* analysis, Petitioner's *Batson* claim would fail regardless of which approach this Court takes. Second, the Arizona Supreme Court properly ruled that Petitioner was not entitled

to an instruction pursuant to *Simmons* because he had no right to waive his eligibility for parole, and the trial court could have imposed a release-eligible life sentence. Finally, the Arizona Supreme Court correctly determined that the prosecutor did not engage in misconduct that deprived Petitioner of a fair trial.

A. THE ARIZONA SUPREME COURT CORRECTLY CONCLUDED THAT THE TRIAL COURT IMPLICITLY DETERMINED THAT PETITIONER HAD NOT MET HIS BURDEN OF PROVING PURPOSEFUL DISCRIMINATION.

Petitioner first asserts that the Arizona Supreme Court's conclusion that the trial court implicitly determined that Petitioner did not carry his burden of proving racial discrimination is incorrect and contrary to the approach of "the bulk of jurisdictions." (Petition at 9-10.) He contends that the Arizona Supreme Court simply failed to conduct step three of the *Batson* analysis and maintains there is a split of authority among the federal appellate courts regarding how to review such a failure. (Petition at 9-10.) He asks this Court to conduct an independent review of his *Batson* challenge and vacate his sentence. (Petition at 19.)

To succeed on a *Batson* challenge, a defendant must first make a prima facie case of racial discrimination in the prosecutor's use of peremptory strikes. *Batson*, 476 U.S. at 96. Next, the burden shifts to the State to "come forward with a neutral explanation" for its strikes. *Id.* at 97 Once the State has articulated race-neutral reasons, the trial court must determine whether the defendant has established purposeful discrimination. *Id.* at 98. The ultimate burden of persuasion always remains with the defendant. *Purkett v. Elem*, 514 U.S. 765, 768 (1995).

With respect to the third step of the *Batson* analysis, "the critical question in determining whether a [defendant] has proved purposeful discrimination is the persuasiveness of the prosecutor's justification for his peremptory strike." *Miller-El v. Cockrell*, 537 U.S. 322, 338-39 (2003). The trial court must determine whether the prosecutor's race-neutral explanations are credible by evaluating the prosecutor's demeanor; how reasonable, or how improbable, the explanations are; and whether the proffered rationale has some basis in accepted trial strategy. *Id.* at 339.

This Court has never held that a trial court may not implicitly complete step three of the *Batson* analysis by denying the challenge. *See McKinney v. Artuz*, 326 F.3d 87, 100 (2d Cir. 2003) (no "clearly established federal law" requires trial court to provide express reasons for each credibility determination). The Second, Fifth, Eighth, and Eleventh Circuits have followed the approach the Arizona Supreme Court took here, as have a number of state supreme courts. *See Messiah v. Duncan*, 435 F.3d 186, 201-02 (2d Cir. 2006) (holding that "as long as each side to a *Batson* dispute is provided an opportunity to make its record, a clear expression of the trial court's acceptance or rejection of a peremptory strike is an adequate adjudication of the merits of the *Batson* claim; the failure to make particularized findings in such circumstances in no sense qualifies or undermines the trial court's *Batson* ruling"); *Stevens v. Epps*, 618 F.3d 489, 499 (5th Cir. 2010) (not unreasonable for state supreme court to conclude that trial court implicitly credited prosecutor's reason for striking juror); *Edwards v. Roper*, 688 F.3d 449, 457 (8th Cir. 2012) ("The denial of

a *Batson* challenge 'is itself a finding at [*Batson's*] third step that the defendant failed to carry his burden of establishing that the strike was motivated by purposeful discrimination,' and it 'includes an implicit finding that the prosecutor's explanation was credible.'") (internal citations omitted); *Hightower v. Terry*, 459 F.3d 1067, 1072 n.9 (11th Cir. 2006) (court may "make 'the common sense judgment'—in light of defense counsel's failure to rebut the prosecutor's explanations and the trial court's ultimate ruling—that the trial court implicitly found the prosecutor's race-neutral explanations to be credible, thereby completing step three of the *Batson* inquiry"); *see, e.g.*, *Jacox v. Pegler*, 665 N.W.2d 607, 614 (Neb. 2003) ("The district court's rejection of [the defendant's] claim of discrimination embodies an implied finding under the third step of the *Batson* test that [the defendant] did not carry his burden of proving purposeful discrimination."); *State v. McCullough*, 270 P.3d 1142, 1161 (Kan. 2012) ("[T]he district court's analysis of the third step can be implied from its consideration of the prosecutor's reasons and the defendant's rebuttal of them before overruling the *Batson* challenge.").

Petitioner asserts that the federal appellate courts have taken three approaches to cases in which a trial court does not conduct the third step of the *Batson* analysis: "(1) a de novo review by the appellate court and, when the record does not support a prosecutor's reasons, an order for a new trial; (2) an order remanding to the trial court for further findings; and (3) reliance upon the trial court's decision regardless of its failure to conduct the third step of *Batson*."

(Petition at 10.) Even if there is such a split of authority, it has no bearing on the outcome of Petitioner's case because, under any approach, his *Batson* claim fails.

If this Court were to review de novo whether the record supports the prosecutor's reasons, it would reach the conclusion that Petitioner did not meet his burden of proving purposeful discrimination. The prosecutor gave race-neutral reasons for each of his strikes, and Petitioner, given the opportunity to dispute those reasons, failed to do so. Rather, Petitioner merely stated that

> we want the record to reflect that the reasons given by the State regarding Juror numbers 32 and 34 did not cure or justify the strikes and we believe the reasons given by the State's attorney supports [sic] the contention that they were struck for reasons of ethnicity or race; that's all.

(Pet. App. J at 15.) Petitioner offered no reason to believe the prosecutor's race-neutral reasons were pretextual. Petitioner now argues—based only on a cold appellate record—that the prosecutor's reasons are not supported by the record because "[n]othing confirms Juror 32 had long hair and was unkempt, or that Juror 34 had tattoos." (Petition at 19.) But Petitioner's attorney at trial (who viewed the jurors in person) did not dispute the prosecutor's factual statements that Number 32 had long hair and a long beard or that Number 34 had visible tattoos. (Pet. App. J at 12-14.) Nor did the trial judge disagree with the prosecutor's physical description of those prospective jurors. There is no reason to believe the facts as stated by the prosecutor are untrue.

Petitioner also asserts that "[a] prosecutor's failure to question prospective jurors on issues later relied upon to support strikes indicates a discriminatory

intent." (Petition at 19.) He cites *Miller-El v. Dretke*, 545 U.S. 231 (2005), for that proposition, but that case does not support his conclusion. There, the prosecutor questioned and struck a black venire member who expressed unequivocally that he could impose the death penalty on a defendant regardless of the possibility of rehabilitation, but did not further question or strike non-black venire members who stated they might not impose the death penalty if the defendant could be rehabilitated. *Id.* at 244-45. Here, the prosecutor did not question *any* prospective jurors about tattoos, hair styles, or hygiene. Thus, as the Arizona Supreme Court determined, the fact that the prosecutor did not ask questions related to Number 32's long hair and facial hair and Number 34's tattoos is not evidence of discriminatory intent. *See Lynch*, 357 P.3d at 139.

Similarly, if this Court were to remand to the trial court for further findings, the outcome would be the same. The trial court would simply make explicit its basis for concluding the prosecutor was credible and his reasons were genuine, based on the same record that exists now. *See United States v. Rutledge*, 648 F.3d 555, 560 (2011) (remanding to district court to make "explicit credibility findings"); *United States v. McAllister*, 693 F.3d 572, 582-83 (6th Cir. 2012) (same). Thus, this Court need not resolve which is the proper approach when a trial court does not explicitly state its reasons for concluding that a defendant did not meet his burden of proving purposeful discrimination. Petitioner's claim fails under any approach, and the petition for writ of certiorari should be denied.

B. PETITIONER WAS NOT ENTITLED TO A *SIMMONS* INSTRUCTION.

Petitioner next asserts that, because he was ineligible for parole, and the State placed his future dangerousness at issue, he was entitled to a jury instruction pursuant to *Simmons*. (Petition at 21-26.) Before the penalty phase, Petitioner filed a purported waiver of his "right" to be considered for a release-eligible sentence and requested an instruction stating that, if the jury decided he should be sentenced to life, the court would sentence him to natural life, "which means [Petitioner] would never be released from prison for his entire life." (Pet. App. N at 9.) The trial court rejected Petitioner's attempted waiver and instructed the jury that, "If the sentence is life imprisonment, then the court will sentence the Defendant to either life imprisonment without the possibility of release from prison, or life imprisonment with the possibility of release from prison after 25 years." (Pet. App. R.) The court further instructed the jury that "'[l]ife without the possibility of release from prison' means the Defendant will never be eligible to be released from prison for any reason for the rest of his life. He will not be eligible for parole, work furlough, work release, or release from confinement on any basis, and his sentence cannot be commuted." (Pet. App. R.)

In *Simmons*, this Court held that "where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible." 512 U.S. at 156. "*Simmons* applies only to instances where, as a legal matter, there is *no possibility* of parole if the jury decides the appropriate

sentence is life in prison." *Ramdass*, 530 U.S. at 169. In other words, *Simmons* does not apply when no state law prohibits the defendant's release on parole. *State v. Hardy*, 283 P.3d 12, 24 (Ariz. 2012).

The sentencing statute applicable to Lynch provided:

> If the court imposes a life sentence, the court may order that the defendant not be released on any basis for the remainder of the defendant's natural life. An order sentencing the defendant to natural life is not subject to commutation or parole, work furlough or work release. If the court does not sentence the defendant to natural life, the defendant shall not be released on any basis until the completion of the service of twenty-five calendar years if the victim was fifteen or more years of age and thirty-five years if the victim was under fifteen years of age.

A.R.S. § 13–703(A) (2001). Because the applicable statute does not prohibit Petitioner from ever being released on parole, the trial court did not err by instructing the jury that if it returned a life verdict, the court would sentence him to either natural life or life with the possibility of release after 25 years.

In *Simmons*, the defendant was legally ineligible for parole because he had two prior felony convictions. 512 U.S. at 156. In this case, as a *legal* matter, if the jury returned a life verdict, Petitioner could have eventually been eligible for release on each of his convictions. *See Ramdass*, 530 U.S. at 169. He could have received a parole-eligible sentence, and though there may not be a currently existing parole mechanism as Petitioner notes (Petition at 22), nothing prevents the legislature from creating a parole system in the future for which Petitioner would have been eligible had the court sentenced him to life with the possibility of release after 25 years. Whether, as a *practical* matter, he would ever be released, is

irrelevant to the inquiry. *See State v. Hargrave*, 234 P.3d 569, 583 (Ariz. 2010) (instruction that defendant was eligible for release was correct even though defendant may have been unlikely to be released).

The trial court also correctly rejected Petitioner's attempt to waive his "right" to a release-eligible sentence. Arizona law "does not confer a 'right' to parole eligibility on defendants," but leaves that decision "squarely within the trial court's discretion." *State v. Benson*, 307 P.3d 19, 32 (Ariz. 2013). In *State v. Dann*, 207 P.3d 604 (Ariz. 2009), the defendant filed a pretrial "waiver" of his statutory right to parole and stipulated that, should he receive a sentence less than death, he would agree to be sentenced to life without parole. *Id.* at 626. The Arizona Supreme Court concluded that the defendant could not "'presentence' himself" because Arizona's sentencing statute for first-degree murder "gives the trial court discretion to decide what penalty Dann should receive if spared the death penalty." *Id.* Thus, Petitioner had no "right" to parole eligibility to waive, and the trial court could have imposed a sentence of death, natural life, or life with the possibility of release.

Accordingly, because Petitioner could be sentenced to life with the possibility of release, and could not waive his eligibility for such a sentence, the trial court was not obligated to give a *Simmons* instruction, and instead had only to properly instruct the jury regarding the possible sentences. The trial court did so by instructing the jury that

> If your verdict is that the Defendant should be sentenced to death, he will be sentenced to death. If your verdict is that the Defendant should be sentenced to life, he will not be sentenced to death, and the court will sentence him to either life without the possibility of release until

> at least 25 calendar years in prison are served, or "natural life," which means the Defendant would never be released from prison.

(Pet. App. S. at 18.) The court's instructions accurately stated the law. *See* A.R.S. § 13–703(A).

The trial court correctly refused to give a *Simmons* instruction and properly instructed the jury on the possible sentences. Thus, this Court should deny the petition for writ of certiorari.

C. THE PROSECUTOR'S CONDUCT DID NOT DEPRIVE PETITIONER OF A FAIR TRIAL.

Petitioner contends that the prosecutor's alleged misconduct, and the Arizona Supreme Court's purported refusal to recognize such misconduct, should compel this Court to grant the petition and vacate Petitioner's death sentence. (Petition at 27-30.) The Arizona Supreme Court here thoroughly considered each allegation of misconduct and determined that, individually and cumulatively, they did not deprive Petitioner of a fair trial. *Lynch*, 357 P.3d at 127-36. The court concluded that "prosecutorial misconduct, while present in some instances, was not so pronounced or sustained as to require a new sentencing trial." *Id.* at 136.

Petitioner provides no reason for this Court to reconsider the Arizona Supreme Court's conclusion that the prosecutor's actions, even if they amounted to misconduct, did not deprive Petitioner of a fair trial. Rather, he rehashes the alleged instances of misconduct in this case, without demonstrating that they were so pervasive that they deprived him of due process. (Petition at 28.) *See, e.g.*, *United States v. Weinstein*, 762 F.2d 1522, 1542 (11th Cir. 1985), *cert. denied*, *Weinstein v. United States*, 475 U.S. 1110 (1986) ("Reversal on the basis of

prosecutorial misconduct requires that the misconduct be 'so pronounced and persistent that it permeates the entire atmosphere of the trial.'") (quoting *United States v. Alanis*, 611 F.2d 123, 126 (5th Cir.), *cert. denied*, 445 U.S. 955 (1980)).

Petitioner also criticizes the Arizona Supreme Court for concluding that the prosecutor's conduct did not deprive him of a fair trial, when that court had previously found instances of misconduct by the same prosecutor. (Petition at 29-30.) But whether the prosecutor engaged in misconduct in *other* cases has no bearing on whether he engaged in misconduct in *this* case. Rather, it was Petitioner's burden to prove prosecutorial misconduct that deprived him of a fair trial in this case, *see, e.g., United States v. Daychild*, 357 F.3d 1082, 1099 (9th Cir. 2004), and the Arizona Supreme Court concluded that he failed to do so. Petitioner offers no reason for this Court to reach a different conclusion.

The Arizona Supreme Court concluded that, at most, the prosecutor "made some improper remarks," and properly determined that the trial court's sustaining of a number of Petitioner's objections and its instructions to the jury cured any prejudice that might have resulted from the prosecutor's actions. *Lynch*, 357 P.3d at 135-36; *see also, e.g., United States v. Washington*, 462 F.3d 1124, 1136 (9th Cir. 2006) ("A judge's prompt corrective action in response to improper comments usually is sufficient to cure any problems arising from such improper comments."); *United States v. McCarthy*, 54 F.3d 51, 56 (2d Cir. 1995) (concluding that alleged misconduct did not deprive defendant of a fair trial because trial court cured prejudice where it sustained objections and cautioned the jury that questions asked

by counsel are not evidence). Petitioner has not established that the Arizona Supreme Court erred in this determination, much less that it decided an important federal question in a way that conflicts with another state court of last resort, federal court of appeals, or this Court, or that it decided an important question of federal law that has not been settled by this Court. *See* Sup. Ct. R. 10(b), (c). And in fact, the Arizona Supreme Court properly set forth the standards for evaluating prosecutorial misconduct claims consistent with this Court's precedent and followed those standards in deciding Petitioner's case. *See Lynch*, 357 P.3d at 127. Petitioner has offered no reason, much less a compelling one, for this Court to second-guess the Arizona Supreme Court's decision. Accordingly, this Court should deny the petition for writ of certiorari.

CONCLUSION

Based on the foregoing authorities and arguments, Respondent respectfully requests this Court to deny Shawn Patrick Lynch's petition for writ of certiorari.

Respectfully submitted,

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No. 15-8366

IN THE

Supreme Court of the United States

SHAWN PATRICK LYNCH,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE ARIZONA SUPREME COURT

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In *Batson v. Kentucky*, 476 U.S. 79 (1986), this Court set forth a three-step process for evaluating whether peremptory strikes were used in an discriminatory manner: (1) the defendant must make a prima facie showing of discrimination, (2) the State must provide a race-neutral reason for the strike, and (3) the court must determine if the defendant demonstrated purposeful discrimination.

2. Courts have split regarding how to address a trial court's failure to conduct the third step—an error that occurred here. Three approaches exist: (1) independently review the record and vacate the conviction when the record does not support the proposed race-neutral reasons, (2) remand to the trial court to conduct the third step, and (3) consider a ruling implicit and defer to that implicit ruling.

   What is the proper appellate procedure to address a trial court's failure to conduct the third *Batson* step?

3. Under *Simmons v. South Carolina*, 512 U.S. 154 (1994), when the only legal alternative sentence to death is life without the possibility of parole, upon request, the trial court must inform the jury that life without parole is the only alternative. Possible legislative changes or commutation do not obviate this requirement. While Arizona abolished parole in 1994, and life without parole is the only legally available alternative to death, the Arizona Supreme Court has continuously refused *Simmons* instructions by relying upon the availability of commutation. Has the Arizona Supreme Court decided this question in a manner that conflicts with *Simmons* and its progeny?

4. The Arizona Supreme Court had previously found that the prosecutor in this case, Juan Martinez, committed misconduct in at least two prior cases. In this case, Martinez committed misconduct on approximately seventeen occasions during trial, including two types of misconduct that the Arizona Supreme Court had previously addressed. Is a defendant's Due Process right to a fair trial secure when a prosecutor with a history of misconduct commits misconduct on several occasions through the defendant's trial?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 1

I. During Batson's third step, trial courts determine if the defendant demonstrated purposeful discrimination. Courts are split regarding how to resolve a trial court's failure to conduct the third step. This Court should clarify that independent review is proper because independent review best protects a defendant's and the public's Equal Protection rights under the Fourteenth Amendment. Applying this test, this Court should vacate Lynch's death verdict. 1

A. Because this Court has not yet indicated how lower courts should resolve the failure to conduct the third step of a *Batson* analysis, jurisdictions have created three different approaches: (1) independent review, (2) remand, and (3) deference to an implicit ruling. 2

B. To resolve this split, this Court should clarify that where a trial court has failed to follow *Batson v. Kentucky*, appellate courts must independently review the record and order a new trial when the record does not support a prosecutor's proffered race-neutral reasons. 4

C. Applying the correct test—independent review—this Court should vacate Lynch's sentence. 5

Conclusion 7

II. Because Shawn Lynch was ineligible for parole and the prosecution placed Lynch's future dangerousness at issue, Lynch was entitled to an instruction on parole ineligibility under *Simmons v. South Carolina* and the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. To justify the trial court's refusal to read a *Simmons* instruction, the Arizona Supreme Court relied upon the availability of clemency—a form of release irrelevant to *Simmons* 8

Conclusion 9

III. Shawn Lynch's Due Process right to a fair and reliable capital penalty phase, guaranteed by the Fifth and Fourteenth Amendments, was violated by the prosecutor's repeated and persistent misconduct.....10

TABLE OF AUTHORITIES

Page

UNITED STATES SUPREME COURT CASES

Batson v. Kentucky, 476 U.S. 79 (1986) 2, 4, 5, 6, 7
Harrington v. Richter, 562 U.S. 86 (2011) 1
Miller-El v. Cockrell, 537 U.S. 322 (2003) 5
Miller-El v. Dretke, 545 U.S. 231 (2005) 3, 5, 6
Purkett v. Elem, 514 U.S. 765 (1995) 4, 5, 7
Ramdass v. Angelone, 530 U.S. 156 (2000) 9
Simmons v. South Carolina, 512 U.S. 154 (1994) 8, 9
Solem v. Helm, 463 U.S. 277 (1983) 9
Snyder v. Louisiana, 552 U.S. 472 (2008) 2, 3

ARIZONA SUPREME COURT CASES

State v. Lynch, 234 P.3d 595 (Ariz. 2010) 9
State v. Lynch, 357 P.3d 119 (Ariz. 2015) 8

FEDERAL CASES

Adkins v. Warden, Holman CF, 710 F.3d 1241 (11th Cir. 2013) 3
Davis v. Baltimore Gas and Elec. Co., 160 F.3d 1023 (4th Cir. 1998) 6
Dolphy v. Mantello, 552, F.3d 236 (2d Cir. 2009) 3
Edwards v. Roper, 688 F.3d 449 (8th Cir. 2012) 1, 3
Evenstad v. Carlson, 470 F.3d 777 (8th Cir. 2006) 1, 3
Green v. LaMarque, 532 F.3d 1028 (9th Cir. 2008) 5
Hall v. Zenk, 692 F.3d 793 (7th Cir. 2012) 1, 3
Hightower v. Terry, 459 F.3d 1067 (11th Cir. 2006) 1, 2, 3
McGahee v. Alabama Dept. of Corrections, 560 F.3d 1252 (11th Cir. 2009) 3
McKinney v. Artuz, 326 F.3d 87 (2d Cir. 2003) 2
Messiah v. Duncan, 435 F.3d 186 (2d Cir. 2006) 2
Stevens v. Epps, 618 F.3d 489 (5th Cir. 2010) 1, 3
U.S. v. Arce, 997 F.2d 1123 (5th Cir. 1993) 6
U.S. v. McAllister, 693 F.3d 572 (6th Cir. 2012) 2, 5
U.S. v. Rudas, 905 F.2d 38 (2d Cir. 1990) 6
U.S. v. Rutledge, 648 F.3d 555 (7th Cir. 2011) 2, 5

OTHER STATE CASES

Jacox v. Pegler, 665 N.W.2d 607 (Neb. 2003) 2

TABLE OF AUTHORITIES (continued)

Page

CONSTITUTIONAL PROVISIONS

United States Constitution

Fifth Amendment 8
Eighth Amendment 8
Fourteenth Amendment 1, 8

STATUTES

United States Code

28 U.S.C. § 2254(d) 1, 3

Arizona Revised Statutes

§ 13-703(A) 8
§ 41-1604.09 8

STATEMENT OF THE CASE

Lynch relies upon the Statement of the Case presented in the Petition.

REASONS FOR GRANTING THE WRIT

I. During *Batson*'s third step, trial courts determine if the defendant demonstrated purposeful discrimination. Courts are split regarding how to resolve a trial court's failure to conduct the third step. This Court should clarify that independent review is proper because independent review best protects a defendant's and the public's Equal Protection rights under the Fourteenth Amendment. Applying this test, this Court should vacate Lynch's death verdict.

The State's brief illustrates why this Court should accept this case in this procedural posture. To argue that several jurisdictions use an implicit ruling approach, the State relies heavily upon Anti-Terrorism and Effective Death Penalty Act (AEDPA) cases. *See* Br.Opp., 7-8 (citing *Stevens v. Epps*, 618 F.3d 489 (5th Cir. 2010); *Edwards v. Roper*, 688 F.3d 449 (8th Cir. 2012); *Hightower v. Terry*, 459 F.3d 1067 (11th Cir. 2006)). But AEDPA cases provide little insight when the claim is that a split exists.

AEDPA relief can only be granted if a state decision "was based on an unreasonable determination of the facts" or "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" this Court. 28 U.S.C. § 2254(d). Federal law is not clearly established "so long as fairminded jurists could disagree on the correctness of that decision." *Harrington v. Richter*, 562 U.S. 86, 88 (2011) (quotation marks and citation omitted). Thus, a split strongly suggests there is no "clearly established Federal law" on an issue. *See Hall v. Zenk*, 692 F.3d 793, 799 (7th Cir. 2012); *Evenstad v. Carlson*, 470 F.3d 777, 783 (8th Cir. 2006).

A case on direct appeal is the best vehicle to resolve the split raised in this case. A case on direct appeal is ripe, clearly presents the split, and is not obfuscated by AEDPA deference.

Lynch's case, as it currently stands, presents the ideal case for this Court to resolve this split. This Court should not await a later procedural posture.

A. Because this Court has not yet indicated how lower courts should resolve the failure to conduct the third step of a *Batson* analysis, jurisdictions have created three different approaches: (1) independent review, (2) remand, and (3) deference to an implicit ruling.

First, the State attempts to portray the implicit ruling approach by pointing to a number of cases that have approved of implicit rulings. *See* Br.Opp., 7-8. The existence of such cases is no surprise. Lynch agreed the implicit ruling approach is used. Even if the State's argument is accepted, a split still exists. The Ninth Circuit still independently reviews and the Third, Sixth, and Seventh Circuits still remand. Indeed, the State recognizes the Sixth and Seventh Circuits endorse the remand approach. *See* Br.Opp., 10 (citing *U.S. v. Rutledge*, 648 F.3d 555 (7th Cir. 2011); *U.S. v. McAllister*, 693 F.3d 572 (6th Cir. 2012)). Thus, even if the exact balance of the split shifts, the split still exists.

But the balance does not shift because the State's cases fall largely into one of two errors: the cases predate *Snyder v. Louisiana*, 552 U.S. 472 (2008), or apply AEDPA. First, Lynch's petition identified the importance of *Snyder v. Louisiana*, 552 U.S. 472. *See* Pet.Cert., 10, 13-14. In *Snyder*, this Court independently reviewed the record to determine if the prosecutor's proffered race-neutral reasons for a strike were supported and found the proffered reasons implausible and pretextual. 552 U.S. at 477-85. Courts have read *Snyder* to direct the proper relief in absence of *Batson* findings. *See* Pet.Cert., 13.

In light of *Snyder*'s importance, cases that predate *Snyder* give little assistance. Thus, *McKinney v. Artuz*, 326 F.3d 87 (2d Cir. 2003); *Messiah v. Duncan*, 435 F.3d 186 (2d Cir. 2006); *Hightower v. Terry*, 459 F.3d 1067 (11th Cir. 2006); and *Jacox v. Pegler*, 665 N.W.2d 607 (Neb. 2003), all cited by the State, provide little insight. Since *Snyder*, the Second Circuit has applied a

remand standard and the Eleventh Circuit has applied independent review. *See Dolphy v. Mantello*, 552, F.3d 236, 240 (2d Cir. 2009); *McGahee v. Alabama Dept. of Corrections*, 560 F.3d 1252 (11th Cir. 2009); *Adkins v. Warden, Holman CF*, 710 F.3d 1241 (11th Cir. 2013). Nebraska does not appear to have addressed the issue since *Snyder*.

Additionally, several cases cited by the State shed little light because they are AEDPA cases. *See Edwards v. Roper*, 688 F.3d 449, 453 (8th Cir. 2012) (reviewing under AEDPA); *Stevens v. Epps*, 618 F.3d 489, 493 (5th Cir. 2010) (same); *Hightower v. Terry*, 459 F.3d 1067, 1068 (11th Cir. 2006) (same). As noted above, AEDPA authorizes relief only where there is a violation of "clearly established Federal law, as determined by" this Court. 28 U.S.C. § 2254(d)(1). Where there is a split, Federal law is generally not "clearly established." *See Hall*, 692 F.3d at 799; *Evenstad*, 470 F.3d at 783.

Edwards demonstrates just how difficult it is to obtain AEDPA relief. In *Edwards*, the defendant raised two *Miller-El v. Dretke*, 545 U.S. 231 (2005) claims: the state court applied an overly-rigorous similarity standard to the comparison of jurors and the court improperly substituted reasons on the prosecutor's behalf. *See Edwards*, 688 F.3d at 455-56. The Eighth Circuit rejected both arguments because *Miller-El v. Dretke* was decided two years after state proceedings ended. *Id.* at 456. Before *Miller-El v. Dretke*, neither issue was "clearly established Federal law." *Id.* at 455-56; *see also Stevens*, 618 F.3d at 499 (holding AEDPA required deference to state court's determination that implicit finding was made and to the implicit ruling itself).

In light of how difficult the AEDPA standard is when circuit splits are involved, it makes sense that the State found AEDPA cases approving the implicit ruling approach. But this does not reflect the practices of the circuits; this reflects the deference required by AEDPA.

B. To resolve this split, this Court should clarify that where a trial court has failed to follow *Batson v. Kentucky*, appellate courts must independently review the record and order a new trial when the record does not support a prosecutor's proffered race-neutral reasons.

In his Petition, Lynch explored the legal and policy reasons why this Court should endorse the independent review standard. Pet.Cert., 13-15. Lynch also explained why the implicit ruling approach was constitutionally problematic. *Id.* at 16-19. While remand is not the best standard, it is better than the implicit ruling approach. *Id.* at 15-19.

None of the State's arguments address this analysis. The State does not explain why the implicit ruling approach is preferable; the State merely points to its existence. Instead, the State focuses the remaining argument on Lynch's third contention: that independent review should result in a new trial. Thus, Lynch will not rehash the advantages and disadvantages of each approach. As the State noted, a "decision that decides an important federal question in conflict with another state court of last resort or United States court of appeals" is a compelling reason to grant a writ of certiorari. Br.Opp., 5. The existence of a split is good cause to review this case.

The State's step-three analysis, however, illustrates why this Court should reject implicit rulings. The State's third-step analysis largely seeks to justify the strike because it satisfied the second prong. *See* Br.Opp., 9-10. This analysis errantly conflates steps two and three—an error this Court clarified is impermissible in *Purkett v. Elem*, 514 U.S. 765, 766 (1995). In *Purkett*, the prosecutor's proffered race-neutral reasons were similar to those offered here: hair length and facial hair. *Id.* The Court of Appeals found the justification pretextual under the second step. *Id.* at 767. This Court concluded the appellate court erred "by combining *Batson*'s second and third steps into one ...." *Id.* at 768.

If the trial court does not conduct the third step, the court inherently combines *Batson*'s second and third steps. The trial court will not have considered a challenging party's third-step

arguments or whether the proffered race-neutral reasons are reasonable, credible, or linked to accepted trial strategy. And this is precisely why the rationale of the vast majority of jurisdictions that either independently review or remand is so persuasive: "if there is nothing in the record reflecting the trial court's decision, then there is nothing to which [courts] can defer." *Rutledge*, 648 F.3d at 559; *see also McAllister*, 693 F.3d at 582; *Green v. LaMarque*, 532 F.3d 1028, 1031 (9th Cir. 2008).

C. Applying the correct test—independent review—this Court should vacate Lynch's sentence.

The State's second argument is that neither independent review nor remand leads to a different result. The State's argument, however, confuses the second and third *Batson* steps.

During *Batson*'s second step, any explanation will suffice, no matter how implausible. *Purkett*, 514 U.S. at 767-68. Thus, a decision that stops at the second step does not comply with *Batson*. As the State noted, during the third step a court must determine if the race-neutral reasons are credible. *See* Br.Opp., 7 (citing *Miller-El v. Cockrell*, 537 U.S. 322, 338-39 (2003)). "Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." *Miller-El v. Cockrell*, 537 U.S. at 339.

The State's argument does not address any of these factors. *See* Br.Opp., 9-10. The State does not discuss demeanor, reasonableness, or whether the proffered reasons have a basis in accepted trial strategy. *See id.* Instead, the State's argument suggests that compliance with the second step is adequate; because Lynch did not dispute that Juror 32 had long hair or that Juror 34 had visible tattoos, the strikes were legitimate.

This assertion begs the question of whether Lynch had an opportunity to engage in such a dispute. The trial court allowed the strikes without giving Lynch the opportunity to rebut the

proffered race-neutral reasons. Appx. J, 15. Faced with a contrary ruling, Lynch quickly and efficiently objected to avoid waiver. *See U.S. v. Rudas*, 905 F.2d 38, 41 (2d Cir. 1990) (*Batson* error waived if challenging party does not dispute proffered race-neutral reasons); *Davis v. Baltimore Gas and Elec. Co.*, 160 F.3d 1023, 1027-28 (4th Cir. 1998) (same); *U.S. v. Arce*, 997 F.2d 1123, 1127 (5th Cir. 1993) (same).

However, even if the State's argument is given its full weight, it carries none. Presuming Juror 32 had long hair and Juror 34 had visible tattoos, the State does not argue either rationale is reasonable or finds a basis in accepted trial strategy. Rather, the State merely distinguishes *Miller-El v. Dretke* because this prosecutor did not ask anyone about tattoos or long hair. Br.Opp., 9-10.

But this argument strikes at the heart of any accepted trial strategy. If the prosecutor had a legitimate strategy reason for striking people with tattoos, the prosecutor would have asked questions to identify who had tattoos. A prosecutor cannot shield discriminatory strikes as strategy when the prosecutor has not demonstrated any legitimate interest in the issue.

And none of this even touches on the strike of Juror 32. Even if Juror 32 had long hair or poor hygiene, the prosecutor did not offer any trial strategy reason for striking a person with long hair or poor hygiene.

The State also ignores two additional arguments weighing in Lynch's favor. First, the record undermined the prosecutor's proffered reason for striking Juror 32. The prosecutor argued he also struck Juror 299 partially because of hygiene reasons. Appx. J, 13-14. But the prosecutor only argued to strike Juror 299 because of 299's attitudes toward lying. Appx. I, 128-29. The prosecutor's unsupported attempt to bootstrap in a new reason for striking Juror 299 undermines the legitimacy of his strike of Juror 32.

Second, the State ignores this Court's guidance in *Purkett*. While long hair and facial hair is a satisfactory second-step reason, this Court referred to the reason as silly, implausible, and fantastic. 514 U.S. at 768. This rings true here. Striking jurors based on perceived grooming and hygiene did not have any basis in accepted trial strategy. This prosecutor did not link hygiene or hair length to trial strategy. He did not explain why people with long hair might be more skeptical of the State's evidence. And he did not describe why people with facial hair might be more likely to sympathize with Lynch.

The prosecutor's reason, as silly and implausible as it is, satisfied the second step. That is all trial court found: "The Court finds that the reasons given for the State's striking Juror numbers 8, 32, 34, 49 and 255 are all race neutral and I will allow the strikes." Appx. J, 15. The trial court did not evaluate the prosecutor's credibility; the court stopped after step two.

Finally, the State's argument that remand merely requires explicitly stating the implicit is incorrect. Remand would require the court to conduct the third *Batson* step. Lynch could challenge the prosecutor's proffered race-neutral reasons, compare Jurors 32 and 34 to unchallenged jurors, and require the court to engage in the full third-step process. While the court may reach the same result, it is neither a sure bet nor a reason to deny review.

CONCLUSION

The trial court failed to conduct the third *Batson* step and there is a split amongst courts regarding the proper remedy. The Arizona Supreme Court deferred to an implicit ruling—an approach soundly criticized. For the reasons stated in the Petition and this Reply, this Court should grant review and hold that independent appellate review is proper when the trial court has not conducted the third *Batson* step.

II. Because Shawn Lynch was ineligible for parole and the prosecution placed Lynch's future dangerousness at issue, Lynch was entitled to an instruction on parole ineligibility under *Simmons v. South Carolina* and the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. To justify the trial court's refusal to read a *Simmons* instruction, the Arizona Supreme Court relied upon the availability of clemency—a form of release irrelevant to *Simmons*.

In his Petition, Lynch evaluated several issues. The State isolates its arguments to just the first: Lynch was entitled to a *Simmons* instruction; Lynch was not eligible for parole and future dangerousness was at issue.

The State's primary argument retreads ground rejected by this Court in *Simmons v. South Carolina*, 512 U.S. 154 (1994). The State recognizes that parole has been abolished. Br.Opp., 12. Nevertheless, the State argues that parole was legally available because, "nothing prevents the legislature from creating a parole system in the future for which Petitioner would have been eligible had the court sentenced him to life with the possibility of release after 25 years." Br.Opp., 12. This argument ignores *Simmons*.

In *Simmons*, South Carolina also argued that the legislature could change the law to allow parole in the future. *Simmons*, 512 U.S. at 166. This Court dismissed the argument: "To the extent that the State opposes even a simple parole-ineligibility instruction because of future hypothetical future developments, the argument has little force." *Id.*

The State offers no reason to give this argument new weight. Instead, the State focuses its energy on the fact that the sentencing statute references parole as an unavailable release mechanism for persons sentenced to life without the possibility of release. First, the presence of the word "parole" does not indicate that parole is available to Lynch—the Arizona Supreme Court ruled that parole was only available to people who committed an offense before January 1, 1994. *State v. Lynch*, 357 P.3d 119, ¶ 65 (Ariz. 2015). While A.R.S. § 13-703(A) does not prohibit Lynch from being released on parole, A.R.S. § 41-1604.09 does. *See id.*

Second, the nature of the State's argument would merely raise the *Simmons* issue in a different light:

> Can a state that has abolished parole circumvent the requirements of *Simmons* by merely failing or refusing to delete every reference to parole?

Under this Court's jurisprudence, the answer is no. This Court's has consistently focused on whether parole is available to the defendant. *See Simmons*, 512 U.S. at 166-69; *Ramdass v. Angelone*, 530 U.S. 156, 169 (2000); *see also Solem v. Helm*, 463 U.S. 277, 300-01 (1983). When there is no possibility of parole—as there is not in a state that abolished parole—a *Simmons* instruction is required if the prosecutor places the defendant's future dangerousness at issue. *See Simmons*, 512 U.S. at 168-69; *Ramdass*, 530 U.S. at 165.

The State's second argument—that a defendant cannot presentence himself—ignores the procedural posture of Lynch's case. *See* Br.Opp., 13. While Lynch cannot presentence himself, Lynch's request was the product of his desire to reraise the *Simmons* issue. The first trial court granted the prosecutor's Motion to Preclude Testimony Concerning Availability of Parole. *See* Appx. L; *see also* Appx. K (motion). Although Lynch raised *Simmons* on his first appeal, Appx. M, 75-78, the Arizona Supreme Court did not rule on the issue, *State v. Lynch*, 234 P.3d 595, ¶¶ 82-89 (Ariz. 2010). Thus, in his subsequent sentencing, the initial ruling was still binding. Lynch merely attempted to raise the issue in a different light.

CONCLUSION

Future dangerousness was at issue and Lynch was not eligible for parole. Nonetheless, the trial court rejected a *Simmons* instruction and prevented Lynch from presenting testimony or argument regarding parole ineligibility. And the Arizona Supreme Court, continuing its practice of ignoring *Simmons*, affirmed. This Court should accept this matter and order a new trial where the trial court instructs the jury that Lynch is not eligible for parole.

III. **Shawn Lynch's Due Process right to a fair and reliable capital penalty phase, guaranteed by the Fifth and Fourteenth Amendments, was violated by the prosecutor's repeated and persistent misconduct.**

The State's sole argument is that the Arizona Supreme Court did not err by concluding Lynch received a fair trial. Br.Opp., 14-16. This issue is adequately presented in the Petition.

Respectfully submitted this 7th day of April, 2016.

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No. 15-8366

IN THE

Supreme Court of the United States

SHAWN PATRICK LYNCH,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE ARIZONA SUPREME COURT

AFFIDAVIT OF MAILING

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MIKEL STEINFELD deposes and says:

I am a member of the Bar of the Supreme Court of the United States. On the 7th day of April, 2016, I delivered a package containing an original and ten copies of Petitioner's Reply in Support of Petition for Writ of Certiorari in the above-captioned case, addressed to the Clerk of the Supreme Court of the United States, to FedEx for overnight delivery.

Respectfully submitted this 7th day of April, 2016.

MARICOPA COUNTY PUBLIC DEFENDER

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SUBSCRIBED AND SWORN to before me this 7th day of April, 2016.

LUCIA M. TABER
Notary Public - State of Arizona
MARICOPA COUNTY
My Commission Expires
May 2, 2017

_____
NOTARY PUBLIC

My commission expires:

May 2, 2017